

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record. 6

(IN TWO VOLUMES.)

WILLIAM REID and WILBUR P. REID, Part-
ners Doing Business Under the Firm Name
and Style of NATIONAL COLD STORAGE
and ICE COMPANY,

Plaintiffs in Error,

vs.

H. A. BAKER,

Defendant in Error.

VOLUME II.

(Pages 257 to 523, Inclusive.)

Upon Writ of Error to the United States District
Court of the District of Oregon.

FILED

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(Deposition of Matthew H. Theis.)

“Q. Would there in your opinion be any deterioration or loss in quality? A. No, sir.

“Q. Mr. Theis, do you know what the market price of loganberries was, such as you purchased from H. A. Baker on this contract under which you [219] received these 100 barrels, on the day you received them here in Chicago?

“A. The market price was 17½¢ f. o. b. Pacific Coast.

“Q. And the price had not changed, that is, from the time you contracted for them until the time you received them? A. No, sir.

“Mr. ELEY.—I think that is all, Mr. Boothe.”

Mr. SPENCER.—Shall I read the cross-examination?

Mr. BOOTHE.—Yes, go ahead.

Mr. SPENCER.—I would just as soon turn it over to you. This is cross-examination by Mr. Boothe.

Mr. BOOTHE.—If you can give the proper inflection I will take your word for it.

Mr. SPENCER.—All right, I will do that. (Reads deposition:)

“Q. Mr. Theis, what do you mean by the expression ‘cold packed’ berries?”

Mr. SPENCER.—If you don’t mind, Mr. Boothe, I believe you would better read this. I am tired.

Mr. BOOTHE.—Are you? All right, I will assist you, then. (Continues reading of deposition:)

(Deposition of Matthew H. Theis.)

“Q. Mr. Theis, what do you mean by the expression ‘Cold packed’ berries?”

“A. It is berries packed in barrels, not to be cooked. There is two different packs of cold pack, one with sugar and one without. When they are packed raw without any other method of preservation except cold.

“Q. Then would you say that loganberries picked and put into barrels in the afternoon or evening of the *same that* they were picked, would be what you term cold pack?”

“A. Not cold packed, no; they could not be packed cold if they went in hot. [220]

“Q. That is what I am trying to find out, what you mean by cold packed berries?”

“A. That is a trade term.

“Q. These, then, would not be considered cold packed, would they?”

“A. I didn’t say they were cold packed. Cold pack, when you buy loganberries, it is a trade term, you buy 100 barrels of cold pack.

“Q. Well, now, let us get again, what is cold pack.

“A. Cold pack means berries taken from the field and put in barrels and put in cold storage.

“Q. They must be in cold storage, then, to come within the term of cold pack, as you have expressed it?”

“A. They have to be in cold storage after they are packed.

“Q. How soon would they have to be put into cold

(Deposition of Matthew H. Theis.)

storage after they were picked and put into barrels, to make them come under the term or denomination of cold pack?

“A. Well, say within forty-eight hours. You are speaking of loganberries, now?

“Q. Yes. You had no business relations with the National Cold Storage and Ice Company, the defendants herein, except to receive from Mr. Baker the transfer of certain barrels of loganberries, had you? A. That is all.

“Q. You bought these loganberries from Mr. Baker, as you say, and had the shipping receipts transferred to you, and you ordered them out of the warehouse in Portland at the time that you have mentioned here, that is about all you had to do with them?

“A. No, not shipping receipts, the warehouse receipt.

“Q. Warehouse receipts, I should have said, instead of shipping receipts. Now, if these goods were shipped from Portland on November 16th and received by you at Chicago on December 3d, they would have been en route something like seventeen days, would they not?

“A. Yes, sir. [221]

“Q. Do you know whether or not these goods that you bought from Mr. Baker about which you have testified were conveyed in refrigerator cars?

“A. Yes, sir; they were.

“Q. Do you know what degree of refrigeration they were in during the time of their transit? I am asking if you know?

(Deposition of Matthew H. Theis.)

“A. I don’t know the car where they were.

“Q. Then you don’t know, do you?

“A. No, sir.

“Q. You don’t know whether they were above 26 degrees refrigeration or not, do you?

“A. No, sir.

“Q. You don’t know whether they were salted, whether the ice was salted during the transit, do you? A. No, I do not.

“Q. Do you know whether or not the cars were re-packed with ice at any time while in transit?

“A. If the cars were what?

“Q. Re-packed with ice at any time while in transit?

“A. I do know that, because we were charged for re-icing; if the railroad charges for icing and didn’t put the ice in, why then that is another proposition. Our instructions to the railroad were to re-ice at all icing stations.

“Q. Were those goods marked in good order by the shipper or the railroad company or the canner when they were started from Portland?

“A. No, they were not.

“Q. I notice from examination of Plaintiff’s Exhibit 2, there is a stamp on this bill of lading, ‘All barrels stained’; do you know who put that stamp on this bill of lading?

“A. I don’t know positively. It is assumed that the railroad put it [222] on; I didn’t see anybody write it on there.

(Deposition of Matthew H. Theis.)

“Q. Do you know whether or not the goods contained in the National Cold Storage and Ice Company’s plant, for which Mr. Baker is now suing the National Cold Storage and Ice Company, were part of the same goods that you purchased from Mr. Baker, or do you know whether the goods that you purchased from Mr. Baker were part of those now in question between the plaintiff and the defendant?

“A. I don’t know anything about Mr. Baker’s business at all.

“Q. You bought these goods from Mr. Baker during the year 1920; at about what time did you make the purchase?

“A. January 9, 1920, is the date of the contract here, January 8th.

“Q. January 8th, 1920? Now, on your direct examination you were asked the following question: ‘From your experience in handling fruit and berries, particularly loganberries, if loganberries were picked during the months of July and August in the State of Oregon, in the neighborhood of Salem, Oregon, and were packed during the afternoon or evening of the same day in which they were picked from the bushes, and within six or seven hours after they were packed in barrels they were transported and placed in cold storage, what would be the condition of those berries as to fermentation.’ Your answer to that question was that they would be good, I believe? A. Yes, sir.

“Q. In answering that question it was not stated

(Deposition of Matthew H. Theis.)

to you how long they were in transit, or how long after they were picked and packed and put into the warehouse? A. I said six hours.

“Q. That was what you meant, was it?

“A. It says from six to seven hours.

“Q. They must have been put into the warehouse within six or seven hours, then? [223]

“A. It mentions that in the question.

“Q. And if it was more than six or seven hours, there might be some there?

“A. No, I don't say that.

“Q. I am asking you if there would be any there?

“A. No, there would not.

“Q. There would not be any there?

“A. No, sir.

“Q. How long could they remain in these barrels in the months of July and August without being damaged?

“A. Well, if they were—you mean outside?

“Q. Outside of the cold storage?

“A. I would say that forty-eight hours would still keep them in average condition. Longer than that, I don't believe they would—they would commence to deteriorate.

“Q. Suppose that these goods were picked and packed as suggested in that question which you have answered, and transported by open trucks during the day-time, and in the summer months, say in July and August, what effect would the warm weather and jolting of barrels in transit have upon the berries?

(Deposition of Matthew H. Theis.)

“A. I don’t believe it would have any effect on loganberries.

“Q. You don’t think it would hurt them, then, to jolt them and knock them around?

“A. No, not loganberries; they are hardy berries.

“Q. Would you say that if loganberries were picked in and about Salem, and packed in barrels at the time you have mentioned, and conveyed in trucks to Portland, Oregon, a distance of some fifty-two miles, and these berries would be fermenting when they arrived there, if they were taken there within forty-eight hours?

“A. I don’t believe they would be fermenting.

“Q. Suppose, then, as a matter of fact when they arrived at the cold storage plant they were fermenting and blowing up; what would you say was the cause of this? [224]

“A. Well, that fermentation is caused by lots of things. I can make loganberries ferment inside of twelve hours by taking and mashing them up. There might be different causes. If they took berries and the berries were packed and were fermented, why, they evidently were probably four or five days old.

“Q. Then if those berries were delivered to the cold storage plant in a fermenting condition, and a blowing up condition, they must have been handled in a bad way, some way or another, provided they were taken there within forty-eight hours, is that not true?

(Deposition of Matthew H. Theis.)

“A. No, it would not be possible to have fermented berries in forty-eight hours.

“Q. Well, I am asking you, suppose if it should appear that that was the fact, that they were fermenting when brought to the cold-storage plant, then they must have been mishandled or miskept in some way or another, must they not?

“A. Yes, but you said within forty-eight hours.

“Q. Well, within forty-eight hours.

“A. I can't reconcile myself to the fact of loganberries spoiling in forty-eight hours. If they came there fermented without my knowing what time they were handled from the field, I would say that they were mishandled, but not within forty-eight hours, because I have known fresh loganberries to be shipped from Oregon into Chicago here, and it takes a longer time than forty-eight hours to get them here, and they still were fresh, so you could not have them fermented in forty-eight hours.

“Q. Well, you have stated that there are so many hours in which they can be made to ferment?

“A. Well, as I say, unless you deliberately take a masher and mash them up like you would grapes for wine, or something to that effect, it would cause fermentation. [225]

“Q. Would you say that loganberries, picked and packed within six or seven hours, as you have mentioned, and hauled some fifty-two miles and put in cold storage, could be termed frozen berries?”

Mr. BOOTHE.—I will say these questions were brought about by the complaint, the term “frozen.”

(Deposition of Matthew H. Theis.)

Mr. SPENCER.—I understand.

Mr. BOOTHE.—(Continues reading deposition as follows:)

“Q. If loganberries are packed in barrels within a proper time after they are picked, and put into a cold-storage plant in good condition, will they not remain in good condition at a temperature of as high as 36 degrees?

“A. No, not unless they are chilled first, no, they will not.

“Q. Are you a chemist?

“A. No, sir, I am not a registered chemist, no; but I know enough about some things that probably a lot of chemists don't know.

“Q. Have you ever kept any loganberries in storage as high as 36 degrees?

“A. Well, not any quantity of them; I might have kept a barrel and left them out. But from my experience, I know that they would not keep at 36 degrees.

“Q. Now, take these loganberries that you have rejected, is it not a fact that these berries can be re-processed and bring them back into substantially their original condition? A. No, sir.

“Q. Do you know how they are re-processed?

“A. The only way you can get loganberries—the only way that these loganberries could be used would be by re-cooking them, and you could never bring any fruit back to its original form after it once started to ferment.

(Deposition of Matthew H. Theis.)

“Q. They are not injured much by the fermentation, are they?

“A. Yes, they are; fermentation breaks down the cells or fibers of the fruit; and by cooking the loganberries you could not bring them back [226] to the fresh state.

“Q. Where are these 100 barrels now?

“A. The second hundred barrels are down in, I think, the Western Cold Storage.

“Q. You got the full 200 barrels, did you?

“A. We got the full 200 barrels.

“Q. You have rejected them all, have you?

“A. We rejected them, yes.

“Q. As bad? A. Yes.

“Q. Have you taken any legal proceedings against anybody regarding them?

“A. Yes, sir; we notified the National Cold Storage and Ice Company and they were very arbitrary in the matter; they didn't think that they were at fault at all.

“Q. What did you notify them for?

“A. Well, who would I notify?

“Q. Why would you notify the National Cold Storage Company?

“A. They had the goods in their control.

“Q. They were shipped in good condition, were they not?

“A. No, sir, not according to all indications, they were not; we pack goods and put them in storage and the storage company is supposed to keep those goods for you in perfect shape; that is why you put

(Deposition of Matthew H. Theis.)

them there. Anybody can take goods and let them go to waste or spoil.

“Q. Has anyone brought any legal proceedings against the Railroad Company for damages for the miscarriage of these goods?

“A. No, sir, because the possibility of the claim is for various reasons, one reason was noted on there when they received the goods that the barrels were stained, and the second reason is that the barrels came in fifty or eighty pounds short, which would not happen in sixteen days' time. [227]

“Q. Did you pay Mr. Baker for those goods?

“A. I paid him before I brought them out; we paid him against his warehouse documents a few days after the date of the invoice.

“Q. Then the full 200 barrels have been paid for by you? A. By me, yes.

“Q. Are you taking any legal proceedings against Mr. Baker concerning them?

“A. I don't know whether we have or not, to tell you the truth, because I don't handle those matters myself, and whether we have gone as far as legal proceedings I could not state definitely.

“Now, let us come back to the issues in this case. You have testified generally about goods that you bought from Mr Baker; now, let me state to you that in this case at issue Mr. Baker is suing the National Cold Storage Company for the total loss or destruction of some 398 barrels of loganberries stored in their warehouse; do you know of your own knowledge what the condition of those berries was

(Deposition of Matthew H. Theis.)

when they were put into the cold storage, into the cold-storage plant? A. I do not.

“Q. Of course you don’t know when they were put in there? A. No, sir.

“Q. Now where they were picked? A. No, sir.

“Q. You have stated that the price of loganberries was $17\frac{1}{2}\text{¢}$ f. o. b.; does that mean here in Chicago, or where does it mean?

“A. It is $17\frac{1}{2}\text{¢}$ —well, it depends on whether you say f. o. b. Chicago, it would mean Chicago; if you say Portland, it would mean $17\frac{1}{2}$ cents out there.

“Q. Can you state what was the value, the price, of loganberries in Portland, Oregon, during July, 1920? [228]

“A. I can state what Mr. Baker’s price was, it was $17\frac{1}{2}$ cents.

“Q. I know, but do you know what they were worth on the market?

“A. Yes, they were worth—I guess you could not buy them anywhere else; the Chicago market was about $19\frac{1}{2}$ cents.

“Q. Do you know what the Portland, Oregon, market was at that time?

“A. Well, yes, they were offering goods and getting $17\frac{1}{2}$ cents and more for them.

“Q. Do you know of any sales that were made in Portland at $17\frac{1}{2}$ cents? A. No, I do not.

“Q. Do you know of any sales that were made in Portland in July, 1920, at any price?

“A. You mean to someone else?

“Q. Yes. A. I don’t know.

(Deposition of Matthew H. Theis.)

“Q. Then you cannot state the reasonable value of loganberries?”

“A. I can certainly state that, surely.

“Q. In Portland, Oregon, in July, 1920?”

“A. Market values are market values, whether it is Portland, Oregon, or San Francisco, or anywhere else; because it is just like buying sugar; sugar is worth so much at the refinery, whether it is in one State or another. It is the market on the goods.

“Q. Well, this is a question, a case for damages for goods at Portland, Oregon?”

“A. Well, that was the market price.

“Q. And you are going to say that that was the market price in Portland, Oregon, in July, 1920?”

“A. Surely.

“Q. But you don't know of any sales that were made there? A. No, sir.

“Mr. BOOTHE.—That is all.

“Redirect Examination by Mr. ELEY.”

Mr. SPENCER.—Go ahead. [229]

Mr. BOOTHE.—(Continues reading deposition:)

“Q. Mr. Theis, you stated in your cross-examination that in your opinion loganberries would not ferment in forty-eight hours; if they are packed in barrels and before placed in storage, would keep for forty-eight hours; do you mean under any and all conditions?”

“A. That is, conditions like taking goods off of the field.

“Q. Supposing they were packed in barrels in the customary way of packing, and the barrels left

(Deposition of Matthew H. Theis.)

standing in the hot sun; what effect do you think that would have?

“A. If they were left standing in the hot sun for a long time, it might have some effect on them.

“Q. Now, you also mentioned, or stated, in reply to one question of Mr. Boothe’s, that loganberries placed in a temperature of 36 degrees after first being chilled, that they would not ferment.

“A. Well, I mean a reasonable time.

“Q. How long a time would you say was a reasonable time?

“A. Well, if they were brought out of a temperature of 26 to 36 and left, say, a week, why they would probably commence to show signs of deterioration.

“Q. In other words, it is your opinion, then, that if they were kept in a temperature of 36 degrees for a week or so, even after being chilled, they would begin to ferment, or deteriorate? A. Yes, sir.

“Q. When you refer to the price of loganberries at Portland, Oregon, in the summer of 1920, in the months of July and August, what manner of pack do you refer to?

“A. Loganberries packed in barrels.

“Mr. ELEY.—I think that is all.

“Recross-examination by Mr. BOOTHE.

“Q. Well, if the loganberries had fermented before they were put in [230] cold storage, and were frozen by the cold-storage company, would they ferment any easier after that if the temperature was allowed to go up? In other words, after they had

(Deposition of Peter J. Slaughter.)

once fermented, would they ferment easier again if the temperature went up?

“A. Why, naturally.

“MR. BOOTHE.—That is all.”

MR. BOOTHE.—That is all this man is asked.

Whereupon proceedings herein adjourned to Wednesday, June 14, 1922, at 10:00 o'clock A. M.

Portland, Oregon, Wednesday, June 14, 1922,
10 A. M.

MR. SPENCER.—This is the deposition of PETER J. SLAUGHTER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

COURT.—What page is that, Mr. Spencer?

MR. SPENCER.—Page thirty-eight. (Reads deposition:)

Deposition of Peter J. Slaughter, for Plaintiff.

“Direct Examination by Mr. ELEY.

“Q. State your name. A. Peter J. Slaughter.

“Q. Where do you reside?

“A. Chicago, Illinois; my home address?

“Q. Yes. A. 701 North Latrobe Avenue.

“Q. How long have you lived in Chicago?

“A. About twenty-nine years.

“Q. What is your business, Mr. Slaughter?

“A. Manager of the preserving, manager of the manufacturing end of the preserves, syrups and jellies.

“Q. What company are you with?

(Deposition of Peter J. Slaughter.)

“A. It is called the Wholesale Grocers’ Corporation now; at that time it was the Durand & Kasper Company.

“Q. When was the change made from Durand & Kasper Company?

“A. Last July, July 1st. [231]

“Q. How long have you been connected with Durand & Kasper? A. Twenty-seven years.

“Q. And the Wholesale Grocers’ Corporation?

“A. Twenty-seven years.

“Q. How long have you had charge of the canning and preserving department?

“A. About twenty-two years.

“Q. What are your duties as manager of the department in a general way, stating in a general way? A. Buying and overseeing the packing.

“Q. Where is the packing done, in Chicago, or outside of Chicago? A. In Chicago.

“Q. You have full charge and direct supervision of the canning and packing department?

“A. Complete charge.

“Q. Have you occasion to buy for your company, or make contracts for your company, of fruits, such as strawberries and raspberries and loganberries, and things of that kind?

“A. All the time, as I see fit, in my own judgment.

“Q. What quantities of these on an average per year do you handle, in carload lots or in barrel lots?

“A. Well, the majority would be in cars, right here in the market, I would say averaging maybe

(Deposition of Peter J. Slaughter.)

four cars of barrel stuff a year; of course there would be thousands of cases.

“Q. You are familiar with the different kinds of packs of fruits, are you? A. Yes, sir.

“Q. What are the different kinds?

“A. That is, straight fruit, or two and one, or three and one?

“Q. Is there a term in the packing industry known as ‘cold pack’?

“A. Yes, that is what I call a cold pack.

“Q. What is ‘cold pack,’ if you know? [232]

“A. The raw fruit; it is a fresh fruit put right in.

“Q. What do you mean, really, by ‘cold pack’?

“A. That would be the raw fruit right from the field without being cooked.

“Q. And it is either packed with sugar or without? A. Or without, as you want it.

“Q. What is the cold pack without sugar called?

“A. Straight.

“Q. Have you had occasion, did you have any business dealings with H. A. Baker during the year 1920? A. Yes, I did.

“Q. What was that?

“A. That was 100 barrels of loganberries; I think I got some red raspberries from them, too,—or strawberries, 100 barrels of strawberries. I bought two lots from them.

“(Document marked Plaintiff’s Exhibit 4 for Identification.)

“Q. I hand you what purports to be a memorandum or a contract, marked for identification Plain-

(Deposition of Peter J. Slaughter.)

tiff's Exhibit 4, and ask you whether or not that is a memorandum of the contract you referred to, which you entered into with H. A. Baker in 1920, or one of them?

"A. This is the original one of those; I had it changed to straight fruit.

"Q. Was there a new contract entered into?

"A. No, it was not; it was optional, which one I wanted.

"Q. The contract was changed, then, by exercising your option? A. That is right.

"Mr. ELEY.—I will ask that that be attached to Mr. Slaughter's deposition as an exhibit.

"Said document is attached hereto and made a part hereof, and marked Plaintiff's Exhibit 4. [233]

"Q. Now, Mr. Slaughter, did you receive, did your company receive the goods, the fruit, called for in that contract? A. We did not.

"Q. Did you receive any goods under the terms of said contract?

"A. That lot we did not, but it was several months afterward, we received fifty barrels; we had lost all kinds of sales by not getting that contract; we had lost practically all the bids on fifty barrels or maybe seventy-five barrels of the loganberries; we still have some of the loganberries to-day.

"Q. Well, did H. A. Baker tender you any goods under the terms of the contract?

"A. Well, he did later on, but we had an awful job to get them; they all came in bad shape, you see; there is where it really came in, anything I

(Deposition of Peter J. Slaughter.)

went over to look at, they were in the same condition.

“Q. Did he tender you any goods at all, at that time?

“A. No, he did not. I think, if I am not mistaken, it was some three or four months afterward; afterward I got some.

“Q. Now, Mr. Slaughter, did Mr. Baker at any time tender you any loganberries under the terms of that contract? A. Yes, he did.

“Q. About what time was it, do you know?

“A. Well, it was, I think probably two or three weeks after that, the lot came in.

“Q. After what?

“A. After this first lot, that lot there.

“Q. That lot was sent to you, was it?

“A. That lot was sent, and I rejected it.

“Q. Where was it sent to, Mr. Slaughter?

“A. Here on this railroad right down here, I don't know as I can call it, on 16th Street, and it belongs to the cold storage on the North Side, they have got a branch over there.

“Q. You were notified, were you, that they were here? A. I was, by the railroad. [234]

“Q. What did you do then?

“A. I went over and looked at it; they told me before that it was in a terrible condition, to come out and look at it; and I went over, and I got busy right away and called the Railroad Company on the telephone.

“Q. You examined the car, did you? A. I did.

(Deposition of Peter J. Slaughter.)

“Q. What did you find the condition of the goods to be in?

“A. I found the loganberries were splattered all over the car, barrels bursted open, and in a horrible shape, sour; they were in such condition that I could not use them.

“Q. What was the price you were to pay for those berries? A. 17½, I think.

“Q. F.O.B. Chicago, or F.O.B.—

“A. F.O.B. there.

“Q. Where, do you mean? A. That is, Coast.

“Q. Now, I will ask you again, Mr. Slaughter, did you examine the berries in the car, freight-car, or were they in cold storage when you examined them?

“A. In the freight-car; they took them out on the platform for me.

“Q. How many barrels did you examine?

“A. I guess I stood there probably at least two hours and a half.

“Q. Did you examine half of them?

“A. Oh, absolutely; I seen practically pretty near all of them.

“Q. Were they received in a refrigerating-car?

“A. They were.

“Q. Did you observe whether the car was well iced or not?

“A. There was ice in it.

“Q. Have you had occasion in your business experience to store loganberries in cold storage warehouses? [235]

“A. Not loganberries, but all other fruits, I have.

(Deposition of Peter J. Slaughter.)

“Q. What other fruits, for instance?

“A. Well, for instance, I would say, loganberries, if I would put that car of loganberries in, I would give them instructions what temperature I would demand them kept in.

“Q. What temperature would you demand them kept in? A. From 16 to 26.

“Q. Have you ever had any experience in strawberries or raspberries? A. Yes, sir.

“Q. And in your opinion, what difference if any is there in the requirements of temperature between loganberries and raspberries and strawberries?

“A. None at all.

“Q. Then in your opinion would you say that whatever requirements as to temperature in storage apply to one class of fruit would apply to another?

“A. Absolutely.

“Q. As far as loganberries, strawberries and raspberries are concerned? A. Yes, sir.

“Q. Are you familiar with the plan of handling such fruits from the time they are picked to the time they are put in cold storage?

“A. Absolutely.

“Q. Will you state what is the usual time required to transport and take the fruit, such as raspberries, strawberries and loganberries, from the vine to cold storage?

“A. No, I could not tell you that, because that is practically a Coast affair, you see.

“Q. Well, you have said that you have had a great deal of experience in the packing and pre-

(Deposition of Peter J. Slaughter.)

servicing of fruits, bought in the market here in Chicago, that is, raw fruits? [236]

“A. Yes, raw fruits.

“Q. Now, do you know what time it takes on the average, to get those fruits from the bush or vine to your cold-storage plant, in Chicago?

“A. Why, I would say, if a berry is picked, say, to-day, I would get it here the next day at about the same time.

“Q. About twenty-four hours?

“A. About twenty-four hours and they would be in the cooler.

“Q. What effect would the weather have upon—I mean the temperature of the weather, have upon the berries from the time they were picked to the time they were put in cold storage, say, in that twenty-four hours, if any? A. It would not have any.

“Q. In your opinion, Mr. Slaughter, how long would it take in the months of July and August, at the berry picking time in this country, to cause the berries to spoil in transferring them or transporting them from the vine to the cold-storage plant?”

Mr. BOOTHE.—That question I object to, speaking of “in this country.”

COURT.—It is too general.

Mr. SPENCER.—All right. I will omit it. Perhaps the next one is the same. Several questions there all refer to that subject.

COURT.—Down towards the bottom of the page, —state when fermentation takes place.

(Deposition of Peter J. Slaughter.)

Mr. SPENCER.—(Continues reading deposition:)

“Q. Now, Mr. Slaughter, how can you tell when fermentation starts on fruits packed in barrels; in the way that these loganberries were packed that were mentioned in that contract?

“A. It forms gas; the minute you give it air, give it a vent, why it will go all over the place, the minute she starts to ferment.

“Q. What do you mean by ‘going all over the place’?

“A. You take one of those barrels that is bulged, that has got gas, and the minute you give it a vent it will blow right out. You see [237] it is continually working in there.

“Q. From your experience and in your opinion, if such fruits as strawberries, raspberries and loganberries packed in barrels in what we understand would be cold packed, keep in a temperature of 26 degrees, if they were in good condition when put in that temperature?

“A. Well, I would say, I can say that I have kept them for over three years, I have had some that kept three years, absolutely perfect.

“Q. In your experience, have you received and examined many barrels of fruit in fermented condition? A. I certainly have.

“Q. Have many come in a fermented condition?

“A. No, I would not say they did; now and then you might find them.

(Deposition of Peter J. Slaughter.)

“Q. Now, in the fruits that arrive here in Chicago, that you have purchased for your manufacturing business, I mean the raw fruits, how are those shipped in, if you know?

“A. In refrigerator-cars.

“Q. Where do the most of them come from?

“A. Why, they come from Washington as a rule, the majority of them, some from down south in Tennessee. I would say the majority of my fruit I buy right here, fresh fruit in cars.

“Q. Where does that fruit come from?

“A. From Michigan, Tennessee and Louisiana.

“Q. And when you say it takes at least twenty-four hours for the fruit to come in here, you mean, do you, that that is the shortest time in which any of it can get here?

“A. That is considered, for Michigan it is figuring a long time; generally they pick over there in the morning of that day, and in the afternoon you get it here, or first thing in the evening; I think three o'clock in the afternoon and five in the morning, I think.

“Q. Well, that that you get from Louisiana, what time would it get here? [238]

“A. It takes two or three days.

“Q. And is that usually in good condition when it arrives?

“A. Absolutely. In fact, I have never found any that was fermented that I ever knew of that came from there. I have found some leakers, of course, if they are tender berries.

(Deposition of Peter J. Slaughter.)

“Q. How are they usually packed?

“A. In crates.

“Q. Suppose loganberries were picked in Salem, Oregon, in the day, in July or August of the year 1920, or any other year, and they were transported to a packing plant near Salem, so that they would be packed in the same afternoon or evening of that day that they were picked, and they were packed in barrels, what is known as cold pack, and within six or eight hours thereafter, transported by truck to a cold-storage plant, say that within twenty-four hours after they were picked they were within cold storage; what in your opinion would the condition of the berries be at the time they were placed in cold storage? A. In A-1 condition.

“Q. What in your opinion, if any, would the condition of the weather have upon them in that time?

“A. It would not have any in that short time.

“Q. What effect, if any, would their method of transportation or handling them have upon them in that time?

“A. It would not have any in that short time.

“Q. Mr. Slaughter, this contract that we introduced in evidence calls for 100 barrels of loganberries. A. Yes, sir.

“Q. Did you have any other contract with Mr. Baker for loganberries?

“A. Not that I—I don't know.

“Q. What was the prevailing market price of loganberries at that time, that is, at the time these berries were tendered to you in 1920? [239]

(Deposition of Peter J. Slaughter.)

“A. I don’t know that there is any change in the market price that would have any effect on them, but it was a matter that our stock was sold, most of it, you see, our goods was sold against these loganberries.

“Q. At 17½ cents? A. Yes.

“Q. F. O. B. Portland? A. That is true.

“Q. Could you or could you not have used more than you had contracted for at that price?

“A. Absolutely.

“Q. Were those barrels of loganberries that were tendered to you, that you have just been testifying about, identified by any numbers or marks?

“A. There were marks on them.

“Q. Have you any record of those numbers or marks? A. No, I haven’t.

“Q. Were they numbered or marked by letter, or what was the identification mark?

“A. They were numbered.

“Q. And did Mr. Baker tender you any other loganberries at the time, that is, I mean in 1920, after you had rejected the shipment called for in that contract?

“A. He did; I think it is the same warehouse, if I am not mistaken, where these were to go, into the western.

“Q. Did you accept those?

“A. I did not, they were in the same condition.

“Q. What do you mean by the same condition?

“A. Well, they were sour, they bulged out, the heads, some of them, were ready to come out, and

(Deposition of Peter J. Slaughter.)

they were in horrible condition, in a fermented condition.

“Q. That is, in the same condition as the first lot that was brought? A. Yes. [240]

“Q. Now, Mr. Slaughter, what effect would the rise of the temperature in a cold-storage house above 26 degrees have upon fruit packed, on loganberries packed in barrels?

“A. Fermentation, sour, it would sour, ferment.

“Q. In your opinion, would fruit, such as loganberries, strawberries, raspberries, cold pack, straight, keep in a temperature of 32 degrees?

“A. It would not.

“Q. Would they keep in a temperature of 28 degrees?

“A. Well, I have always made it a point between 16 and 26, never to go any higher than that, because I would not take a chance above 26.

“Q. Mr. Slaughter, to what use, if any, could these berries that you have rejected be put, in your experience, in manufacturing?

“A. They probably could have been used by certain people, but we have no use for them, that is, for imitation stuff, you see, that is, where you would use about ten per cent fruit and the balance imitation.

“Q. What effect, if you know, did the pure food law of this state have upon your handling such fruit as was tendered you in these instances?”

Mr. BOOTHE.—I object to that question, that State of Illinois.

(Deposition of Peter J. Slaughter.)

COURT.—I don't think that is material.

Mr. SPENCER.—All right. Probably the next one is the same. The next one "You have to mark it, do you?"

Mr. BOOTHE.—How is that?

Mr. SPENCER.—The next one. (Continues reading:)

"Q. Well, supposing you attempted to manufacture it as good fruit, what would be the effect?

"A. Well, I think you would have a lot of it returned, and it would not give satisfaction, because you would get it in the taste of the fruit.

"Q. The fermentation would appear in the taste and quality of the goods? A. Absolutely.

"Q. Do you know when this first carload of loganberries was shipped to you, tendered? [241]

"A. I don't think I could tell you that.

"Q. You don't know the date, don't know the month? A. No.

"Q. About when was it?

"A. I don't know; that I could not tell you.

"Q. Was it during the summer of 1920, or fall?

"A. Late in the summer of 1920.

"Q. You mean by summer—

"A. I think it was in August, I am not sure now, I think it was in August.

"Q. 1920? A. 1920.

"Q. Do you remember when the second car was shipped and tendered?

"A. I don't offhand; I think it was a couple of weeks afterward; I don't remember right off, it

(Deposition of Peter J. Slaughter.)

may have been a little later than that, I think it was later; I think it was probably at least a month or something like that, later than that shipment came in.

“Q. Do you know what market controls the price of loganberries, if any market does?”

“A. The supply and demand, I would say.

“Q. Well, do you know whether the price of loganberries changed any during the year 1920?”

“A. I don't think it did.

“Mr. ELEY.—I think that is all, Mr. Boothe.”

Mr. SPENCER.—Shall I read the cross-examination?

Mr. BOOTHE.—You may go ahead, if you feel like it.

Mr. SPENCER.—This is cross-examination by Mr. Boothe. (Continues reading.)

“Q. Mr. Slaughter, there was 100 barrels tendered to you the first time, is that right, and 100 barrels in the second? A. Yes, sir, 100 barrels. [242]

“Q. Where are those berries now?”

“A. All the last ones we got are still in the warehouse.

“Q. Where are the first ones?”

“A. The first ones were rejected.

“Q. What became of them? A. I don't know.

“Q. And the second 100, you say are still in the warehouse?”

“A. Yes; we rejected the second ones also.

“Q. Well, the first ones you don't know where they are or what became of them?”

(Deposition of Peter J. Slaughter.)

“A. I don’t know where they went; no, I don’t.

“Q. And the second hundred you say is in the warehouse?

“A. No, that is the third one; the second one I also rejected.

“Q. You rejected two and you accepted one, then?

“A. That is the third lot he showed me, the third 100.

“Q. Where did the third lot come from?

“A. Well, it came from the same place.

“Q. When did it come?

“A. Well, that came, I should judge maybe five weeks later, I think, something like that.

“Q. Did they have any signs of distress?

“A. This last lot?

“Q. This last lot.

“A. No, absolutely not, in perfect condition. In fact, I am drawing some out of them now, I still have some of that there lot.

“Q. Mr. Slaughter, if loganberries are allowed to ferment, can those be sweetened up and re-processed to bring them back to their original condition and practically good?

“Well, it may be when you catch it at the start, when you have just got a little bit, but not in the condition that those were in; I think [243] somebody would have to look for them, they were all over the car, they were in such a condition that I wouldn’t ever touch them; I couldn’t touch them.

“Q. Do you know what damaged them?

(Deposition of Peter J. Slaughter.)

“A. I could not say that; all I know is, they were in a fermented condition.

“Q. You didn’t see them before they started, did you? A. No, I did not.

“Q. How did you happen to get them, did you buy warehouse receipts from Mr. Baker?

“A. No, we bought them from Mr. Baker.

“Q. You bought the berries from Mr. Baker?

“A. Yes, sir, from Mr. Baker.

“Q. Did he deliver you the warehouse receipts?

“A. After they got there.

“Q. You just bought them from him?

“A. Yes, sir.

“Q. Do you know where they came from?

“A. From Oregon.

“Q. Do you know what part of Oregon?

“A. No, I do not.

“Q. Can you say whether or not these goods were in a damaged condition before they started, that is, if you recollect? A. That I could not say.

“Q. All you know about them is when you looked at them in the car you found them in a terrible condition, as you put it? A. Absolutely.

“Q. Did it bear evidence of not proper refrigeration in the cars?

“A. No, it didn’t; they had ice in the car at the time we got there.

“Q. Did you test the car to see what the temperature was? A. Yes, I did. [244]

“Q. What was it?

“A. I can’t recall it right now, what it was.

(Deposition of Peter J. Slaughter.)

“Q. Well, did you find it above or below 26?

“A. Well, it was above twenty-six, but exactly I don't know, of course that comes quite a distance, you know, it is re-iced several times before it gets here.

“Q. And naturally you don't know what temperature was maintained at the different times?

“A. No, I do not.

“Q. What effect would the jarring and churning of the goods have in transit here?

“A. Well, if, for instance, if they were fermenting going in there, it would have a big effect on it.

“Q. I didn't get that answer.

“A. If she goes in there fermenting, it would have a big effect on it, it would start up very much quicker.

“Q. And suppose it went in there in good condition, does the jarring and churning of goods in transit on the railroad have a tendency to cause them to ferment? A. No, it would not.

“Q. All you know about where those berries came from is that they came from Oregon somewhere?

“A. Yes, sir.

“Q. Suppose, Mr. Slaughter, that loganberries were picked in and about Salem, Oregon, some fifty-two or fifty-six miles distant from the cold-storage plant of the defendants in Portland, and were put in barrels and shipped by trucks during the warm weather of July and August, how long could they safely be kept out of cold storage in that condition?

“A. I should say a couple of days.

(Deposition of Peter J. Slaughter.)

“Q. I understood you to say that in your direct examination? A. Yes, sir. [245]

“Q. Now, if as a matter of fact, Mr. Slaughter, when these trucks got up to the cold-storage plant with loads of these loganberries on them, and they were fermenting and blowing up, what would you say caused that?

“A. Then I would say that it was caused by the effect of the hot sun on them, it was delay, delay somewhere, I would say.

“Q. You would naturally think then that those berries had been kept out of cold storage more than twenty-four hours, more than two days, I mean, I think you said?

“A. Yes, I would say yes, more than that. Of course it is this way, too, it depends on where you would have them. If you had these loganberries in barrels and put them under the hot sun, you would start them, of course, naturally, quicker than you would if you put them in a cool place; there is a whole lot in that.

“Q. Now, if it should happen that these berries in transit to the cold-storage plant became fermented and were fermenting when put in there, and they were frozen, and then suppose after they had been in the cold-storage plant while the temperature should be allowed to rise somewhat,—and I will say here that the fermenting had been checked by the freezing—and then suppose the temperature had gone up to something above 28 degrees, and they would begin to ferment again,

(Deposition of Peter J. Slaughter.)

would they be any worse damaged by the second fermentation, or would the damage occur by the first fermentation?

“A. By the second; by giving them more heat.

“Q. What I meant to find out is, which would be the cause of the damage, that first fermentation or the second fermentation? A. The second.

“Q. Then the first fermentation would not hurt them, would it?

“A. It would not if you hold your degree in your cooler, if you have got your degrees in the cooler, it would not hurt them.

“Q. Well, suppose these berries came in there sizzling, we will say, and in unloading some of the barrels blew up? A. Yes. [246]

“Q. Now, that is the condition?

“A. Well, if they went in in that condition in the cooler, I think they would blow up in the cooler, it would never hold them, it would not hold them, she would blow just the same.

“Q. When you freeze them they would blow up?

“A. Absolutely.

“Q. They would blow up if you freeze them?

“A. Absolutely, unless you put the barrel half full and leave it enough room for that fermentation to hold, she would blow up.

“Q. You state then that if they were put there in a fermented condition, that the freezing would not stop them from blowing up?

“A. Yes, but it depends on what condition they are in, you see; there is a whole lot in that. If

(Deposition of Peter J. Slaughter.)

you are just starting the fermentation, the cooler would hold them, but if they are in a very bad condition, it would not.

“Q. Then, Mr. Slaughter, if they had been fermented when they were put in there, there would be no necessity of freezing them afterward, would there?

“A. Why, it would, sir, only if, just as I say, if it has just got a slight ferment it will hold them, but if they are just simply bubbling over, they are ruined.

“Q. Then they are ruined when they go in there, and the freezing won't protect them?

“A. It would not protect them if in that condition.

“Q. Isn't it true that if you freeze these berries in barrels that the barrels will burst?

“A. If they are in a fermented condition.

“Q. Yes, if they go in there in a fermented condition?

“A. Just as I say, it depends on how much they are fermented; if it is just starting fermentation, the freezing will stop it, but if it has [247] been going on before, she is going to go up in the air.

“Q. Supposing it has been going on before, and she is put in there and frozen?

“A. It will blow their heads off.

“Q. Even freezing will not prevent their blowing their heads off?

“A. You could not check it, once gas has started in there, all through the barrel, you know.

(Deposition of Peter J. Slaughter.)

“Q. Did you ever see any of them do those things?

“A. I certainly did. We have had experience in several things—syrups, molasses—in the same way. Take a barrel when it is just starting to ferment, you can hold it, but when the fermentation has gone through that barrel, you just move it this way, and I will tell you that head will go up kiting.

“Q. Well, if those berries when taken to the cold-storage plant were in a fermented condition to the extent that you could hear them sizzling, some of the barrels blowing up,— A. Yes.

“Q. Would you consider those berries in good condition at that time?

“A. No, I would not; no, sir.

“Q. Would you consider that by putting them into cold storage, into a cold-storage plant in that condition, they could be preserved and taken care of?

“A. No, not in that condition.

“Q. They could not be protected?

“A. No, sir, they could not.

“Q. Regardless of whether the temperature rose again or not?

“A. Absolutely. My experience is when the gas is that far, why a quarter of a barrel of that stuff, when the gas is in that condition that you say, she will go over the top, just boil right up. Where there is a slight fermentation, you can hold it, you can stop it.

“Q. You didn't pay for the first two lots that you ordered? [248] A. No, sir.

(Deposition of Peter J. Slaughter.)

“Q. Do you know whether or not anybody else paid damages for them?

“A. I don’t know a thing about it; I haven’t heard anything about it until now.

“Q. You don’t know whether there was any claim for damages made against the railroad company?

“A. I don’t know a thing about it.

“Q. And you don’t know whether or not the Railroad Company was negligent in refrigerating the cars, which caused this damage?

“A. That I could not say. You see I haven’t seen a report on the icing, and could not tell you a thing about it.

“Q. All you know about it is that the two cars came in bad condition?

“A. When they arrived, yes, sir, absolutely.

“Q. You don’t remember what temperature they were in at the time?

“A. No, I don’t, offhand, no; but it seems to me that I did look in the top of the car, too, and there seemed to be plenty of ice in the car.

“Q. But you didn’t test it?

“A. That I don’t know; you know it could have been done here fifty miles out and stocked up, you know, that would not be any criterion.

“Q. Exactly true. And you can’t say during the whole transit of two or three weeks what condition they were in?

“A. No, you see I could not tell on that.

“Q. What is the freezing point? A. Thirty.

“Q. Isn’t it thirty-two?

(Deposition of Peter J. Slaughter.)

“A. Some say thirty-two and some say thirty.

“Q. Well, if they were put in there, then, at 32 degrees, if that is the freezing point, doesn't that freeze them? A. No, it don't freeze them.

“Q. It will not freeze them at freezing point?

“A. No, sir.

“Q. They ought to be kept a little lower, you think? A. Absolutely.

“Q. If you put storage berries in barrels and freeze them, say, 16 to 26, will they blow up and burst? [249]

“A. No, not if there is no fermentation going on.

“Q. Well, doesn't the freezing stop the fermentation?

A. Sure, they won't ferment there at all in that condition, if they are going in there right, if you hold up your temperature; but if you lower that temperature, or go one way or the other, the reaction, that will cause it.

“Q. Well, if they go in there in a bad condition, fermented condition, I believe you say that there would be no necessity of freezing them at all, there would be no good in freezing them at all?

“A. You mean to hold them?

“Q. Yes.

“A. No; the only way I would know in that case, that is my idea, would be to go into those barrels and just take about half of them out and get about as many again barrels, and hold them that way.

“Q. Do you know anything about the nature of this case, that we are trying, between Mr. Baker

(Deposition of Peter J. Slaughter.)
and the National Cold Storage and Ice Company,
do you know what the issues are?

“A. No, I do not.

“Q. You don't know what he is suing them for,
do you. A. No, I don't know anything about it.

“Q. Do you know whether or not the goods
that you rejected were part of the goods now mak-
ing up the issues in this lawsuit?

“A. No, I don't know that. All I know is just
the questions you are asking me here; there has
not been anything told me about it at all, I don't
know anything about it.

“Q. Do you know what the market price of these
loganberries in barrels was in July and August in
Portland, in 1920?

“A. Well, as I say, we bought them at 17½.

“Q. I am asking you if you know what the price
of them was in Portland, Oregon, during the
months of July and August? A. No.

“Q. You don't know? [250]

“A. I could not tell you that offhand, no.

“Mr. BOOTHE.—That will be all.

“Redirect Examination by Mr. ELEY.

“Q. Mr. Slaughter, had you bought any fruit,
such as raspberries, strawberries or loganberries,
from Mr. Baker before this lot was contracted for?

“A. Oh, yes, I bought from him for a good many
years.

“Q. Had you ever had any that came fermented
or in bad condition, before? A. No.

(Deposition of Peter J. Slaughter.)

“Q. Have you bought any since that time?

“A. No, I have not.

“Q. You have not bought any fruits from him since? A. No, I have not.

“Q. Do you know the price of loganberries in the market at Chicago, in July and August, 1920?

“A. Well, I can practically tell you, they were asking 25 cents here, if I ain't mistaken, right at that time; of course I would not want to go on the stand and be sure of that point, but I think it was around twenty-five cents.

“Mr. ELEY.—That is all.”

Testimony of J. R. Von Kesler, for Plaintiff.

J. R. VON KESLER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Von Kesler, where do you live?

A. Chicago, Illinois.

Q. And what is your business?

A. Food products and preservers' supplies, under the style of C. L. Jones & Company. [251]

Q. How much experience have you had in that line of business? A. About twelve years.

Q. And just state generally what that business consists of in the way of handling fruit such as is involved in this case.

A. We are recognized as leading distributors of

(Testimony of J. R. Von Kesler.)

cold pack fruits to the preserving fraternity; they look to us for supplies for their output.

Q. And you have offices in Chicago and elsewhere in the east?

A. Chicago, and Boston, Massachusetts.

Q. In your business do you have occasion to handle quantities of barreled loganberries?

A. Very large quantities.

Q. And what has been your experience in handling the products got out by H. A. Baker in the last few years? Have you handled those?

A. We have handled practically all of his output for the last twelve years and supplies from other sources as well.

Q. What experience, Mr. Von Kesler, have you had in observing the handling of fruit from the field into the cold-storage plants.

A. On various occasions I have traced the fruit from the field into the cold-storage plants. I find that the fruit, if it is picked in the forenoon as rule is transported about noon, towards one up to evening, and then put on boats and sent to Chicago and transferred by crates or trucks immediately into the cold-storage house.

Q. And that practice then, the fruit around Chicago,—the practice there—goes from the field to the cold-storage houses, and packed at or near the cold-storage plants, or is some packed at—?

A. Within a radius of possibly as far as two hundred miles it is accumulated there.

Q. It is brought in by what ways?

(Testimony of J. R. Von Kesler.)

A. By boat, without refrigeration.

Q. Is any of it brought in with trucks? [252]

A. Outside of the State of Illinois, at near-by points, it is also brought in in trucks.

Q. I think you have already indicated, perhaps not very definitely, the extent of your experience in handling barreled goods that have been placed in cold storage and then shipped east for disposition.

A. When barreled goods arrive we place them in cold storage, put them in the freezer, see that they are thoroughly chilled and have them placed in a temperature of from sixteen to twenty-six degrees later on and keep them in that temperature indefinitely. I find that they have kept them for three to four years in that room without any distress or deterioration of the quality.

Q. And your business has brought you in contact with cold-storage plants and the handling of barreled goods to what extent?

A. To the extent of inspecting the fruits on arrival there and placing them in the cold storage and re-inspecting them when leaving there, tracing them in the warehouses in the various degrees of temperatures and reselling them at deferred times.

Q. And I understand you to say that when fruit in pack, packed in barrels, is placed in cold-storage plants and kept at a temperature of from sixteen to—

A. Twenty-six.

Q. Twenty-six, that provided the temperature is kept there it will hold them two years?

(Testimony of J. R. Von Kesler.)

A. We have a specific instance where goods were kept in the cold-storage houses for over three years at a temperature of twenty-four degrees and by chemists pronounced absolutely perfect.

Q. Now, suppose—is it the practice at times, also, when the fruit goes into the cold-storage plant to subject it to a lower temperature than sixteen in order to freeze it?

A. That is the established custom, to put it into a lower temperature of sixteen degrees temporarily.

Q. However, is that always done? [253]

A. As a rule it is done.

Q. In either event, whether the fruit is subjected to a temperature which will absolutely freeze it at the outset or whether it is put into a temperature and held at sixteen to twenty-six, I understand you to say that it will hold for two to three years, provided the temperature is kept there?

A. It will.

Q. If the product is frozen absolutely at the outset by a lower temperature, then what effect upon the fruit would be had if the temperature later, when the stuff was held in storage, fluctuated—well, perhaps raised to thirty or thirty-two for a short time, what effect would be had on the frozen goods?

A. The fruit will ferment.

Q. Well, how long a period would it require? Would the temperature have to be up to thirty-six to get a result of fermentation if the fruit had been frozen at the outset?

A. We find that when goods are moved from a

(Testimony of J. R. Von Kesler.)

cold-storage room where they had been in about twenty-six degrees and placed in an ordinary room, that inside of twenty-four hours or possibly forty-eight hours they will show signs of deterioration and in three or four days positive fermentation is in evidence.

Q. If, however, they were frozen solidly in the first place, subjected to a very low temperature and were then placed in a room such as you have described, how long would it require them to ferment?

A. It would make no difference.

Q. Now, what is the fact as to whether or not barreled goods of this general character are kept in storage in Chicago in any substantial quantities?

A. Chicago is the largest distributing centre in the United States for cold packed fruits. I dare say there is more kept at Chicago, year in and year out, than all the points in the United States put together. [254]

Q. And, Mr. Von Kesler, what have you to say as to the effect on the food value of barreled loganberries which have been placed in cold storage, held for a time at twenty-four to twenty-six degrees and remained there for six or eight or ten days, as the case may be—what is the effect upon the food value of that product as the result of that fermentation?

A. That fruit would be thoroughly fermented and unfit for human consumption.

Q. Has it any real, substantial sale value after that? A. None whatever.

(Testimony of J. R. Von Kesler.)

Q. Now, you were out here in the fall of—in the month of December, 1920?

A. The policy of our business—

Q. Just a minute; I say, you were out there, were you? A. Yes, I was.

Q. And what brought you here at that time?

A. The policy of our business is, my partner and myself, to visit our trade annually and that year was my year for making this trip.

Q. And while you were here in Portland in the fall of 1920, did you have occasion to see Mr. H. A. Baker? A. I did.

Q. Had you handled or undertaken to handle his Oregon pack for that year of 1920? A. We did.

Q. And while here did you have any conversation with either of the Reids about the condition of affairs as affecting this fruit in its plant?

A. I did.

Q. Where did you meet Mr. Reid on that visit?

A. In his office at the National Ice and Cold Storage Company.

Q. Was that the time when the discussion was on between Mr. Baker and Mr. Reid which Mr. Boothe has referred to, looking toward some kind—
[255]

A. Mr. Boothe was not present in his office.

Q. Mr. Boothe referred to it yesterday, however, in his examination of one witness. A. Yes, sir.

Q. That is the time when the discussion was on looking to a possible adjustment of this matter?

A. That was the time.

(Testimony of J. R. Von Kesler.)

Q. And did Mr. Reid at that time make any statement in your presence as to what was the cause of the difficulty?

A. Mr. Reid admitted at that time—

Q. Just what did he say; that is what I am getting at.

A. Mr. Reid stated at that time that the loss to the loganberries was due to the fact that he was required to use the juice to manufacture ice which he had contracted to supply. And owing to the excessively hot weather the juice was withdrawn from these rooms for a longer period of time than he had anticipated. He said when the juice was diverted he thought it would be re-directed inside of three days, but the hot spell lasted almost three weeks and he had not calculated upon such an extent of hot weather.

Q. Now, this discussion about undertaking to see what could be gotten out of the product in order to make the loss as light as possible, did that involve your having something to do with the matter?

A. It was suggested that we would try to salvage those goods.

Q. You mean by "we" your firm?

A. The firm of C. L. Jones & Company.

Q. And at that time did you have a notion that it might be possible to salvage some of the goods?

A. It was my personal opinion that if the fermentation had not gone too far they might have a low commercial value.

(Testimony of J. R. Von Kesler.)

Q. Well, nothing came of the proposed adjustment of the matter? A. Nothing. [256]

Q. And then did you later have Mr. Baker on his account undertake to follow up the plan of undertaking to salvage these goods and get what could be gotten out of them?

A. We made diligent effort to sell some of the fermented loganberries which were in Chicago, but could not do so because of their high state of fermentation, they were valueless.

Q. Mr. Von Kesler, what have you to say as to the demand in the market for loganberries in normal condition in the months of July and August or succeeding months of 1920?

A. The demand was greater than the supply; we could not get a sufficient quantity of loganberries to meet the requirements of our preserving trade.

Q. Your business—does your business bring you in touch with the demand in the country for such products?

A. We are looked forward to to supply the users of this fruit. We are recognized as the main source of supply of that kind of wares in the United States.

Q. And do the inquiries as to such products come to you in many instances?

A. By wire, by mail, and almost invariably when buyers are interested, even though at times they don't buy from us, they use us to check the quotations they have from other people.

Q. And you, as I understand you to say, there was a demand on the market for such products?

(Testimony of J. R. Von Kesler.)

A. There was a positive demand.

Q. Are you familiar with the market price of loganberries in barrels of the kind we are talking about here in normal condition in the months of July and August of 1920? A. I am.

Q. At Portland, Oregon?

A. At Portland, Oregon. [257]

Q. What was the price?

A. Loganberries—the source of supply of loganberries is recognized as Portland, Oregon. All quotations are made, are based on the Portland market. In fact, the loganberry price market is made here and we got quotations from Portland at seventeen and a half cents a pound f. o. b. cold storage here.

Q. And was there any change in that price during the succeeding months?

A. There was an advance in that price up to the last of the year.

Q. And that was f. o. b. Portland, Oregon?

A. F. O. B. cold storage, Portland, Oregon.

Q. Did you have occasion to observe any of these carload shipments of this same lot that went east?

A. I am called upon to examine every car of fruit that is shipped from here to Chicago, and I examined every car that came in, every car of loganberries. I examined them in the car and later on in the cold storage and directed their placing and being placed in proper temperature, such as first the freezer and later the sixteen to twenty-six room.

Q. And would you say that these 398 barrels of

(Testimony of J. R. Von Kesler.)

loganberries, assuming they were subjected to a temperature of thirty-six degrees for six or eight days and as a result of the chemical analysis they tested three per cent alcohol and developed a showing of acetic acid, that they had any market value in the fall of 1920 or any time since?

A. Positively not; jam made from that product would taste like vinegar.

Q. Mr. Von Kesler, the deposition of Mr. Slaughter, which was just read, referred to one car—there was a reference first to two shipments and then reference to three shipments, and as I read the testimony I understood the last shipment—the last lot referred to a car which he said arrived in good condition. Do you recall hearing that? Do you know where that car came from? [258]

A. I sold that car, I got that car out of California. It was necessary for me to try to get loganberries for those various people whom I had sold these loganberries to and could not deliver them on account of their fermented state, and I was able to find one car of loganberries on the Pacific Coast and bought same in California and paid seventeen and a half cents a pound f. o. b. California storage for that car and I had to apportion that among the various people and I could only give Mr. Slaughter fifty barrels.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Are you in the employ of Mr. Baker?

(Testimony of J. R. Von Kesler.)

A. I am not.

Q. Are you interested in any way in these berries?

A. None whatever, only as a broker.

Q. You have been with Mr. Baker a great deal during his trial of this case, have you not?

A. I have.

Q. You were with him all the time while we were in Chicago taking depositions, were you not?

A. I was.

Q. You were assisting him very materially in that behalf, were you not? A. Possibly.

Q. You took quite an interest in his behalf, did you not? A. As his broker I did.

Q. And when Mr. Theis was testifying in the case you were very much interested in the testimony that he put in, were you not?

A. Not in the nature of influencing Mr. Theis, but I was interested in the testimony of all.

Q. Isn't it a fact that when Mr. Theis was giving his evidence that you sat there nodding your head and shaking your head until the Referee, [259] Mr. Eley, had to tell you to quit?

A. No, sir, positively.

Mr. SPENCER.—There is nothing in the record of that sort; I think that part—

Mr. BOOTHE.—I know it is not in the record, but I want to ask if it is not true.

A. Positively not; it is a misstatement, a perversion of the truth.

Q. You say it is not true?

(Testimony of J. R. Von Kesler.)

A. Positively not.

Q. Were you not asked by Mr. Eley to sit in another place, where you would not sit so close to the witness, you were talking to him while he was testifying?

A. I don't even know to what that refers to, but I do not believe that had anything to do except that Mr. Eley wanted a direct view of Mr. Theis and I may have obstructed Mr. Eley's view.

Q. Weren't you talking to and whispering to the witness when he was testifying and correcting things, and Mr. Eley at my suggestion asked you to go away? A. No.

Q. Well, were you asked to remove your seat by Mr. Eley at all?

A. I don't recall that at all.

Q. When you were out here at Portland did you hunt Mr. Baker up or did he hunt you up?

A. I believe we met without any prearrangement. When I was out on the Coast I went to Seattle and my trip included everybody on the Pacific Coast as far as San Pedro and I made it a point to visit all packers and intended and did go to Sumner factories. I represent Mr. Baker in other lines, particularly canned goods.

Q. Where did you meet him first on that trip?

[260] A. In Portland, I think.

Q. Did he know in any way beforehand that you were going to be in Portland at that time?

A. I don't think he did.

(Testimony of J. R. Von Kesler.)

Q. Did you write to him, or have anybody write to him that you were going to be here at that time?

A. I expected to meet Mr. Baker in Los Angeles and had advised him that I expected to be there about the fifteenth of December.

Q. Did you tell him you were going to be in Portland?

A. I told him that I would start in at Seattle and work down the Coast.

Q. Did you tell him that you were going to be in Portland at a certain time? A. I did not.

Q. Do you know how he happened to be here at that time? A. I do not.

Q. Where did you meet him?

A. I believe Mr. Baker traced me through his factory; happened to know about when I left; wired to his factory to have me call or notify me that he was in Portland and to look him up. That might also have been done at Seattle, through his broker there.

Q. Did you look him up or did he look you up?

A. I naturally, under those conditions, would look him up.

Q. Where did you find him?

A. At the Benson Hotel.

Q. How did you happen to go with him over to the plant of the National Cold Storage & Ice Company?

A. I was interested in this loganberry proposition and at his invitation I accompanied him to the

(Testimony of J. R. Von Kesler.)

Q. You were interested in this loganberry proposition; what do you mean by that?

A. My shippers in Chicago were preparing actions to recover damages [261] and at that time tentative claims were filed with the railroad companies to recover this possible damage, but after the railroad companies had cleared themselves in one specific instance and in a second instance a suit has been dropped against the railroad company the case has been directed against the storage company. We sell goods f. o. b. Pacific cold storage, and we sold these loganberries f. o. b. Portland cold storage and our shippers are vitally interested in the quality of those goods.

Q. Now you have made that explanation, go along and explain about these actions begun. Was that before you saw Mr. Baker here and went over to Mr. Reid's place? A. What case?

Q. Against the Railroad Company?

A. A tentative claim was filed immediately on the arrival of the goods and after they were pronounced fermented the railroad inspector was called immediately, before the car was unloaded and the goods were unloaded in his presence, in the presence of the railroad inspector, the warehouse man, myself and the buyer.

Q. Now, let us get back to Portland.

A. Yes, sir.

Q. How did you happen to go with Mr. Baker over to Reid's plant, is what I want to find out.

Mr. SPENCER.—He has already answered that.

(Testimony of J. R. Von Kesler.)

A. I wasn't asked to be excused and I wasn't told that I wasn't welcome. It is customary for a broker and their principal to be together at all times.

Q. Now, I would like to know whether or not he invited you to go over there or whether you invited yourself to go with him?

A. I will say that that point was not discussed, and the opinion of neither was asked. [262]

Q. How did you happen to go with him over to the plant?

A. That was his path, or, rather, that was his movement and I accordingly came with him as part of it.

Q. You stayed right with him all the time, did you? A. I did.

Q. Now, did you examine those loganberries in the plant at the time you went over there with Mr. Baker?

A. I was in the room, but I did not examine them.

Q. Do you know whether or not they were in a damaged condition, from your own knowledge?

A. From my personal knowledge I know nothing about it.

Q. Had you been told that they had been fermented? A. I had.

Q. And you have stated, I believe, that when they are fermented once they are ruined?

A. They are.

(Testimony of J. R. Von Kesler.)

Q. Now, Mr. Von Kesler, acting upon that thing, as you knew that those berries were ruined, why did you want to get Mr. Reid to enter into an agreement—I believe you were interested in doing that—enter into an agreement to send those goods to C. L. Jones and Company to be sold and they would make up the difference between the price they would bring and seventeen and a half cents?

A. Mr. Reid had agreed to reimburse Mr. Baker for his loss and Mr. Baker said that he would not exact any profit and he said he was willing to settle upon a basis of sixteen cents a pound and it was suggested that C. L. Jones & Company would try to sell those goods for the best price obtainable and then a statement would be rendered to Mr. Reid showing Mr. Baker's loss, and Mr. Reid agreed to pay this loss.

Q. In other words, you wanted to get Reid to sign an agreement that they would guarantee Baker at least sixteen cents a pound for his berries? [263]

A. Less any possible salvage, yes, sir.

Q. And you knew at the same time, or from your information, that those berries were worthless?

A. The extent of the fermentation had not been positively determined on the quantity of goods which were in the warehouse, but the knowledge regarding the condition of the goods shipped to Chicago was established beyond a doubt.

(Testimony of J. R. Von Kesler.)

Q. Do you know whether or not there were some 231 barrels or thereabout in that cold-storage plant at that time that never had fermented?

A. That never had fermented?

Q. Yes, of these very berries we are talking about?

A. I never knew there was a barrel that was not fermented, because I had implored Mr. Baker and other buyers to give me loganberries to give to my trade.

Q. Did you and Mr. Baker, or did Mr. Baker at the time you were with him, make an effort to sell these goods here to see what he could get and ascertain what the damages were?

A. In Portland?

Q. Yes.

A. I did not; I am not allowed to sell in Portland.

Q. Do you know whether or not Mr. Baker tried or was trying at that time to dispose of these goods? A. I don't know.

Q. Do you not know as a fact that when we met at the Benson Hotel and had this conversation that Mr. Reid asked Mr. Baker how much his damages were and did he not say in words about to this effect: "Mr. Baker, if I have damaged your goods tell me what it is and I will pay you if I think it is right." Didn't he say that?

A. I don't recall those words, but Mr. Reid did say: "You go and sell those berries and I will pay the damages."

(Testimony of J. R. Von Kesler.)

Q. You say he said that at the Benson Hotel during that conversation? Now, isn't it a fact that his statement was: "Mr Baker, how much do you claim damages from me? Let me know and then I will see about paying [264] it, if I think I have damaged them?"

A. I don't recall that at all. It was a specific statement that he would reimburse Mr. Baker after the goods were salvaged, if there was any salvage in them.

Q. You knew Mr. Reid, Senior, took very little part in that conversation, do you not?

A. Mr. Reid, Senior, made the statement when we were about to depart, after you had told him, or after, rather, after you made the statement in the room that you advised him not to sign that agreement. Previous to that time Mr. Reid and his son had agreed and were in harmony to sign that agreement.

Q. Would you sign such an agreement as that, if you were in their place?

A. I would. It would brand me as a man of honor, after I made the statement and that agreement was to the effect that they would reimburse Mr. Baker for his actual loss due to their admitted contribution.

Q. Did not they at all times say that if they were liable for negligence or damage for the goods that they would pay for such damage as they had occasioned?

(Testimony of J. R. Von Kesler.)

A. They had acknowledged their negligence on several occasions and acknowledged their willingness to pay for that. The agreement was drawn up for the purpose of stating, or, rather, was drawn up for the purpose of having something of record in the event that either Mr. Baker or Mr. Reid would perchance die before the settlement were made and Mr. Reid made the statement: "There is my son, he is my heir, he will carry out this agreement and pay Mr. Baker."

Q. Who said that?

A. Mr. Reid, Senior, in your presence, Mr. Boothe.

Q. Where?

A. In the Benson Hotel, in our room.

Q. You positively state that that conversation was had? A. I am positive.

Mr. BOOTHE.—All right; that is all.

Witness excused.

Mr. SPENCER.—If your Honor pleases, that is our case. We rest.

COURT.—Defendants may proceed.

Plaintiff rests. [265]

Testimony of F. A. Kurtz, for Defendants.

F. A. KURTZ, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Kurtz, where do you reside?

(Testimony of F. A. Kurtz.)

A. Salem, Oregon.

Q. Did you reside there in the summer of 1920?

A. I did.

Q. In what business were you engaged there at that time? A. Canning and packing business.

Q. Did you own a canning plant up there?

A. I did, sir.

Q. Did you own the canning plant and packing plant where Mr. Baker was packing his goods at that time, his loganberries? A. I did.

Q. Did you see the packing going on there by Mr. Baker of those goods that were sent to the National Cold Storage and Ice Company?

A. I saw them what they were barreling the first two weeks of the season.

Q. How did they manage that barreling business?

A. Well, the berries were brought in over there from the fields dumped and pressed in barrels, headed up and sent away. Where they took them I do not know.

Q. How were they put into the barrels?

A. They were dumped in out of the crates and sometimes they kind of pressed them in—tampered them in, rather.

Q. With what? A. With a tamper.

Q. That was about two weeks of the time, you say?

A. Yes, the first two weeks of the berry season.

Q. Was he canning berries at the same time?

A. Not while I was there. Now, the last two

(Testimony of F. A. Kurtz.)

weeks of the season Mr. Baker [266] rented my cannery. I had finished all packing of loganberries that I cared to and he took complete charge of that and I went to the coast. I don't know what happened the last two weeks of the season.

Q. Do you know whether or not any of those berries that he canned there blew up?

A. I noticed some in the warehouse when I came back had blowed up and went all over the warehouse—canned berries.

Q. Do you know what was the cause of that?

A. Well, now, there can be various causes for canned goods to blow up. In lots of cases if berries are fermented and not properly sterilized in time they will blow up and then there is other causes. Defective lidding will cause them to blow up, where they take air. There are any number of causes in that way that cause a berry to blow up.

Q. Do you know anything about the trucking of these goods from Salem to Portland?

A. I know they were loaded on the autotrucks and taken away there. From what I know they were supposed to go to Portland.

Q. Had you had some experience in sending barreled goods in to Portland? A. Not that year.

Q. You had had some, had you?

A. I had experience last year.

Q. Last year? A. Yes, sir.

Q. They were packed in the same way, were they?

(Testimony of F. A. Kurtz.)

A. Yes, they were packed in the same way that Mr. Baker barreled his.

Q. What result did you have in shipping them in to Portland by truck?

A. The results I had—I was Manager last year of the Producer's Canning & Packing Company of Salem, Oregon—that is my old place, and for the company I barreled one hundred barrels. I shipped them in to the Union Meat Company cold storage here and the results that I had we lost them all.

Q. What was the cause of their being lost?

A. Well, the things blew up; they fermented.

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Q. Were they good fresh berries when they were put in there?

A. They were just taken out of the field and put in the barrels, headed up and put on the Willamette Valley Transfer and sent in to the cold storage.

Q. Were they tamped in the same way as these berries of Mr. Baker were tamped in?

A. They were.

Q. Headed and barreled the same way?

A. Headed and barreled.

Q. To where did you say you sent them?

A. Union Meat Company's plant.

Q. They were sent out promptly after they were packed and barreled?

A. They were barreled along six in the evening and sent out somewhere eight or nine o'clock.

(Testimony of F. A. Kurtz.)

Q. You say they are fermented and blew up?

A. No, there was about thirty barrels of those that absolutely blew up and the rest of them fermented we had to—we did finally sell them at a very low market.

Q. Did they ferment before they got into the cold-storage plant?

A. The first we sent down Mr. Prentice called me on the phone and he said the berries were blowing up and I had my doubts about that blowing. I came down here and saw them myself, and while they were putting them in the cold storage—they loaded them in the evening and they didn't get into this cold storage until the next morning and when I came down there about nine o'clock they were just rolling some in the cold-storage room and while they were rolling them there was three barrels blew up in the hallway.

Q. Were those berries in substantially the same condition that Mr. Baker's were that he sent down to the National plant? A. I think they were.

Q. Were you aiming to follow the same plan?

A. Yes. In fact of the matter, I never saw a berry barreled before I saw Mr. Baker barrel his.
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Q. In Mr. Baker's packing were the barrels filled pretty full?

A. I think they were filled within about three or four inches of the top.

Mr. BOOTHE.—That is all.

(Testimony of F. A. Kurtz.)

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Kurtz, this canning plant that you had there, you say that Mr. Baker used it the last two weeks of the season?

A. The last half of the season; I think it would be approximately two weeks.

Q. About after the first of August?

A. Well, I could not say as to that, whether it ran clear into the first of August or not. When Mr. Baker rented it we agreed that he should take it the last half of the season.

Q. Now, you had a considerable quantity of canned goods that blew up that season, too?

A. I did, sir. Well, I didn't have them blow up in the warehouse, no, but I got swell bills later on.

Q. What does that mean, "swell bills"?

A. Well, take it, swell bills, a lot of times a can will bust and they call them swells, that is the buyers, and naturally the packer will have to reimburse them for those.

Q. What causes these swells?

A. Well, now, it is just like I say, some berries may have a little fermentation, might not be properly sterilized when they go into the can, may not be cooked enough.

Q. Some of them may not be canned properly?

A. Absolutely.

Q. Tops might not be put on properly?

A. Yes, sir, tops.

Q. And if the tops are not put on properly and

(Testimony of F. A. Kurtz.)

the swells develop and something is not done, what happens to the cans?

A. State the question again, please?

Q. I say, if the tops are not put on properly and they swell and then [269] no further attention is given to them, what happens to the can?

A. Well, they will burst up.

Q. They will blow up? A. Oh, yes.

Q. And that can be from defective canning or the placing of the tops, sealing or what not, as well as anything else?

A. Well, it can be laid to various things, now; it can be laid to bad tin plate put in the cans, if there is little pin holes they will sometimes take air and they will blow up. There are so many things you could lay that to I would hate to say.

Q. You would not undertake to say that was caused by a fermented condition of it?

A. There are so many things it would take a chemist in order to say what it was and I am not one.

Q. Mr. Baker simply took over your crew when he took your canning plant?

A. Well, he did, but the day he took it over I left; I don't know who worked for Mr. Baker after that.

Q. Your understanding was that he had the same canner you had?

A. I understand that he took him whether he kept him through the season I do not know.

Q. Your observation of the berries that season

(Testimony of F. A. Kurtz.)

of 1920 was that they seemed to be very good, average berries, wasn't it?

A. They seemed to me, yes.

Q. You saw nothing about the berries that would indicate any inferior quality that year at all?

A. No, I did not.

Q. Now, Mr. Kurtz, this experience that you had with one hundred barrels was your pack of last year? A. Yes.

Q. 1921. Was that the first packing you ever did?

A. That was the first packing I ever did myself.

Q. You had never done any packing before?

A. No.

Q. How did you get the berries in from the fields; did the growers bring the berries in to your plant? [270]

A. Some of them; some of them we got with our own truck.

Q. And some of them the growers brought in?

A. Yes. The berries were taken in one truck in the morning and brought in in the evening and throughout the day, rather.

Q. And those barrels would go into cold storage the next day?

A. Well, they would leave our warehouse there between eight and nine o'clock.

Q. How long were you engaged in that packing of one hundred barrels? A. Just two days.

Q. You just had a two day experience with the matter and then you quit, was that the idea?

(Testimony of F. A. Kurtz.)

A. Yes, sir.

Q. Well, have you tackled the packing of berries since? A. I have not, sir.

Q. You know that Mr. Baker had been packing berries for a good many years up there, don't you?

A. Yes, I heard of Mr. Baker packing there for I guess four or five seasons.

Mr. SPENCER.—That is all.

JUROR.—When those barrels came to the cold storage in bad order were they marked "bad order" on the receipts?

A. Where they came into the cold storage in bad order?

JUROR.—Yes.

A. You see the way we barreled the berries, we started in with number one and we kept a record of those barrels and the weight that was put in them, and when they came to the cold storage—well, I will tell you, the way I found it out, I followed the load down and saw them blow up and Mr. Prentice telephoned me he didn't know whether we could save any of them and we tried to salvage them and took the fermentation out of them, some of them, but they were sold at half price.

JUROR.—They didn't issue a receipt for them.

These others issued a receipt and marked "bad order" on those in bad order. [271]

A. We didn't get no receipt for those.

Mr. SPENCER.—Your experience was only two days and you didn't have time to get started?

A. No, we didn't have time to get started.

Witness excused.

Testimony of Wilbur P. Reid, for Defendants.

WILBUR P. REID, one of the defendants herein, called as a witness in behalf of defendants, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

You are one of the defendants in this case, are you? A. Yes.

Q. How long, Mr. Reid, have you been engaged in handling that cold storage plant?

A. I have had actual charge for five years, and formerly to that I have been connected with the company since 1909.

Q. You have stored a good many loganberries there and other berries for Mr. Baker, have you?

A. Yes.

Q. How long have you been storing goods for him? A. Three different seasons.

Q. Where is your plant located?

A. 309 East Washington Street, Portland.

Q. That is a pretty large plant, is it not? How much ground does it cover?

A. It covers one block.

Q. You manufacture ice as well as doing a cold storage business, do you? A. Yes.

Q. Manufacture and sell ice? A. Yes.

Q. What were the arrangements that were made between your company and Mr. Baker, if you know, regarding the storage and the price to be paid for these loganberries?

(Testimony of Wilbur P. Reid.)

A. The price arranged was to be more than quoted in 1919. We quoted a price of \$1.15 per barrel for the first month and sixty-five cents for [272] each barrel thereafter for each month; that is for the season of 1920.

Q. Was there any understanding at any time as to what degree of temperature you should maintain in the storage of the goods?

A. No specific degree of temperature had been mentioned; I was to use my own judgment.

Q. Did Mr. Baker ever tell you that you should have a certain temperature?

A. No, he never did. Two or three years previous to that he had mentioned that he wanted it in a freezing condition.

Q. Now, Mr. Reid, you were present at the plant a great deal of the time when these goods were being brought in there, were you? A. Yes.

Q. Did you receive any of them yourself, personally?

A. I was there and saw quite a number come in.

Q. You were there during the daytime, were you?

A. Yes, and sometimes at night.

Q. Now, you may state to the jury what condition those berries were in when they were brought there on trucks, generally.

A. The condition of the barrels and contents were that ten per cent of the barrels received were showing signs of distress by leaking, sizzling, and some of the heads were off entirely, and some of the contents had been thrown out by bursting. They

(Testimony of Wilbur P. Reid.)

frothed and just boiled over and an additional fifteen per cent of the total number of barrels we had to put nail holes in the heads to relieve the pressure of gas to keep them from blowing up. I would say that twenty-five per cent of the total number of barrels during 1920 showed signs of distress upon arrival. The balance were in good condition.

Q. Now, you remember that letter that was produced here, you were instructed by Mr. Baker you were to take a six or eight penny nail and make holes in the barrels? A. Yes, sir.

Q. Did you do according to his instructions in that particular? A. Yes, we did. [273]

Q. And were those barrels that were fermenting and sizzling, as you say, treated in that way?

A. Yes, sir.

Q. Did you notify Mr. Baker that the goods were coming in in that condition?

A. I wrote a letter about that question.

Q. Now, in some of the receipts that were given they were noted "Bad condition"; some of those receipts which were brought in by the drivers who testified yesterday. Did you note on the receipts in those other instances where the barrels were merely fermenting or sizzling?

A. There was just a few receipts that had damaged condition noted on the receipt. We have a record—the foreman has a record of all barrels and numbers as receipted, and the condition, and there are numerous ones, some days there is one

(Testimony of Wilbur P. Reid.)

right after the other on that list showing blowing and damage and leaking.

Q. Now, when those goods were brought there how long were they on the platform or the aisle before they were put into the freezer?

A. In the day time they were put in immediately, kept them rolling, and we had to check every barrel and number, with gross, tare and net; have to make all those records, that took us a little time. The elevator that goes to the basement carries four barrels and it takes a little time for those four barrels to go down, unload and come up and get four more; and at night our night foreman there would know of these coming in; he had other duties, he was foreman over the tank crew for supplying the ice, he was foreman for icing the cars for the Pacific Fruit and Express Company and at all times he was ready to leave his work whenever the arrivals of the barrels and the trucks. He would roll them in and just as soon as one delivery was in he would start to move that to the elevator and down into the basement at night.

Q. They were put in with prompt dispatch, were they? A. Prompt dispatch; yes, sir.

Q. Were they allowed to remain in the aisle for any length of time, any [274] unnecessary time?

A. No, sir, no unusual delay. I would mention that quite a number of the barrels could not be rolled. It was customary to roll the barrels down the aisle and on to the elevator, but there was quite a number could not be rolled, they were in such a

(Testimony of Wilbur P. Reid.)

dangerous condition—fermenting and gas pressure, and was apt to blow the barrels up. It would be exceedingly dangerous to even put one's head near the head of the barrel, it might explode and blow up. We always cautioned the men to keep on the side where the staves were in rolling the barrel as a precaution.

Q. Did any of them blow up there?

A. Yes, sir.

Q. How many of them blew up, if you remember?

A. Well, I may say a total of fifty in the season blew up the heads.

Q. Blew the heads off? A. Yes, sir.

Q. Well, how many were there checked in that exploded and the barrels burst open and exploded there?

COURT.—You mean before they were put in the cold storage?

Q. Before they were put in the freezer.

A. I can give you two or three specific instances; one instance was that there was a truckload of barrels coming in down East Washington Street and at First Street there is an intersection of the Southern Pacific tracks and the tracks are on a little rise and vibrates the load a little bit and there was three blown up there.

COURT.—Were you there when they blew up?

A. I have the report of that.

Mr. SPENCER.—I move that be stricken out.

COURT.—Just what you know yourself.

Q. Just what you know.

(Testimony of Wilbur P. Reid.)

A. This is what I do know, and I have seen, standing on the platform, the loads back up and unload and I have seen several blow up actually there in the daytime.

Q. That you have seen yourself? [275]

A. Yes, I have seen that, yes, and the contents were just like a gravy. You could not see any form of a berry, just a pulp, a mass, and that would bubble and roll right over and go right over the edge of the barrels and on to the platform floor and also on the beds of the trucks.

Q. Now, those that you are speaking about, that blew up on the railroad track there, did you see the muss afterwards, or did you see any part of it yourself after you were down?

A. That is from the report that I have; I did not see that.

Q. You don't testify that you saw that?

A. No.

Q. Very well, we will just pass that and let somebody else speak of that.

A. And inside the aisle—alongside the platform there is a unit room there, an aisle to receive stuff there and the ones that were exploding they have evidence, I have seen stuff on the ceiling—such power of the gas—it is a twelve foot ceiling from the floor and this loganberry juice and pulp would fly all over; I have seen that actually.

Q. Now, Mr. Reid, those berries coming in in a fermenting condition that way, what did you do with them?

(Testimony of Wilbur P. Reid.)

A. We took all barrels as they came in as they were; damaged ones, some partially so and some good barrels; we noted on our storage receipt a few. There was a great many that the foreman just checked on his record that will be brought in evidence later. Our record of the damaged berries, the barrels as they came in.

Q. Now, where did you put them?

A. Put the record or the—

Q. Where did you put the berries?

A. We had to end those up and we trucked those into the basement in the same room.

Q. You put—go ahead.

A. We took care of those just the same as the others in the same room. We could not leave them out in the aisle, could not leave them on the platform, could not leave them on the trucks. We did the best we could. [276] You know the broken barrels are much harder to handle; a broken and damaged barrel will take three times as long to handle it as one in good condition.

Q. Well, did you put them in the freezer?

A. Yes, sir.

Q. How low a temperature did you give them at first? A. We gave them twenty-six degrees.

Q. And did this temperature stop the fermentation?

A. It slowed down the fermentation slowly. It takes considerable time to stop the fermentation; at the end of ten days to two weeks, sometimes longer. It takes that long at least to stop the fer-

(Testimony of Wilbur P. Reid.)

mentation throughout the barrel. The first cold will stop the fermentation around on the edge, on the inside of the barrel, and the third day, and it keeps working to the center and the center is the very hardest to stop; that will keep working away and form alcohol.

Q. To what length of time was it that these 398 barrels you have spoken of here were coming in to the plant?

A. The lot of 398 came in at various times. Quite a number of those were leftovers; that is, we were shipping out carloads and frequently we would come to a damaged one, that had been damaged and fermenting when they came in. We had to keep those there in the basement and retain them. And a great many of these 398 are those.

Q. About how many are there left there that you speak of in this lot?

A. Well, I would say about 140.

Q. That was the accumulation during the season, was it?

A. Yes, that was the worst ones that we could not ship.

Q. Now, you have heard Mr. Baker's statement here regarding the temperature going up to thirty-six degrees, something of that kind. Now you state to the jury what happened at that time.

A. Why, up to the last of July our records show that the room was twenty-six and twenty-seven degrees. And things were in very good shape in the basement. A little bit later, about the fourth of

(Testimony of Wilbur P. Reid.)

August, we used [277] our best judgment to equalize the total ammonia pressure between the ice and cold storage. After all those barrels were frozen at twenty-six and twenty-seven, we were sure that it would not damage those loganberries to put them up a few degrees higher temperature, and the sixteenth and seventeenth of August the temperature had got gradually up to thirty-six degrees. That is the time Mr. Baker and I went in the basement. Mr. Baker is right when he states thirty-six degrees. We don't deny that. But, however, that was only one day at thirty-six. Previous to that it had been colder and since that day it was colder. When he stated thirty-six degrees that is the very one day that it was the warmest. Now, the subject has been brought up that we were short of ice. Now, at that time we were right in the middle of the ice season and we had two units of power for compressing and both were working full power—full capacity and we took some off the ice tanks and put down to the basement to bring that temperature down and some times *vice versa*; we would take a little off the cold storage for the ice; but at no time did I think that that would damage the goods, because they were in a frozen state to begin with.

Q. Well, now, then, during those few days that the temperature went up a little bit, as you say, did some of these goods ferment and when Mr. Baker was there were some of those goods fermenting?

(Testimony of Wilbur P. Reid.)

A. I would say that Mr. Baker and I were there in the basement on the seventeenth of August; that a portion of them, I would say that sixty-five per cent of the total number of barrels were leaking or little signs of juice coming out, but not to any great extent. Mr. Baker went in there and held up his hands and says: "That makes me sick," or something like that, and I said, "That is not very bad, it has only been this way for just a day." I said, "You are excited; we have had this freezing in here right along and I don't think they are damaged."

Q. Now, what can you say as to what portion of those goods were fermenting at that time, whether or not they were those that were fermenting [278] when they went into the plant or those that were not fermenting when they went into the plant?

A. The barrels that showed bubbling and sizzling in the basement on the seventeenth were the ones that had gone in in a damaged condition, the heads blown off, or the ones that we put nail holes in. The centre of these barrels were the hardest to freezing, were the last to freeze in the barrel, and by putting a nail hole, by the instructions of Mr. Baker, to relieve this pressure, when they started to ferment again that is where the juice came, up through those holes; that is what made the appearance of everything going, but such is not the case. We had a great number of barrels there that went in in good condition and they were in good condition at that time, on the seventeenth, and they are in good condition to-day.

(Testimony of Wilbur P. Reid.)

Q. Were the heads made to bulge on account of the freezing?

A. Yes, sir. After Mr. Baker advised me to lower the temperature to twenty-four and twenty-six, the first instructions that he had given me about what temperature he wanted, that was along a little bit after the seventeenth of August and—that question again, I want to answer the question.

Q. (Read.)

A. Oh, yes. Why, during this freezing process of going back again into extreme cold, the barrels commenced to bulge and the heads broke by freezing, and a great number that were in fairly good condition on the seventeenth began to heave and break by freezing. I wrote Mr. Baker a letter, will I reduce the temperature, warm up the temperature from twenty-four or twenty-six to relieve this freezing.

Q. Did you have to put nail holes in the barrels when they were bulging on account of freezing to let the acid out? A. No, we didn't do that.

Q. You didn't do that?

A. At that time, no, that would not take care of the expansion. [279]

Q. Can you state how many of these 398 barrels were not fermenting on this sixteenth or seventeenth of August that you have spoken of.

A. Just a moment, I want to think.

Q. Maybe I am asking you something that you don't know.

A. I could not tell the exact number; it would be an estimate, on the seventeenth.

(Testimony of Wilbur P. Reid.)

Q. Well, was there as much as half of them then?

Mr. SPENCER.—I think if he knows; I don't think he ought to be speculating or guessing here about something he does not know.

A. I could not state the exact number; no, sir.

Q. Have those goods been kept in the freezer ever since that time?

A. Yes, sir, they have been kept at the temperature of twenty-four, twenty-six, since that date.

Q. And they are now at that temperature?

A. Yes, sir.

Q. What is the condition of those goods now?

A. The condition of those goods now are that—

Mr. SPENCER.—If he knows.

Q. Do you know?

A. Yes, I know. There are two hundred—about 213 barrels now that are merchantable; that are ready to ship.

Q. Did you make any test of those berries yourself, or assisted by any of the men?

A. I made a test myself by tasting and by observation of the color and any other test was made by a chemist.

Q. Did you cause any test to be made of a barrel, say, for instance, the worst fermented barrel?

A. Yes.

Q. What did you do? Tell the jury what you did about that.

A. The worst fermented one and one of the best ones we took off samples.

(Testimony of Wilbur P. Reid.)

Q. First of all, how did you do that? Where did you put them to thaw them out? [280]

A. We took the two barrels out of the freezing temperature, put them upstairs in a room of thirty-six degrees for a period of fifteen days and the heads were removed.

Q. Did they ferment?

A. They were exposed to the air and during that fifteen days they gradually thawed; and at no time did they ferment or show any signs of heaving or any movement.

Q. Now, what did you do with those two barrels, then, after you had opened the head?

A. We had them re-processed.

Q. Both of them?

A. Both of them, yes, and tests made; we have reports from a chemist.

Q. Do you know what the test is?

COURT.—The chemist will show that.

Q. You say that they re-processed both the good and the fermented one? A. Yes, sir.

Q. Well, how did they compare then, or did you make any comparison with them, then, of the others that had never fermented?

A. We took one barrel that had never fermented, one of the best barrels that we could find, and also one barrel that had fermented and was in bad shape by fermentation, and both were brought up to the standard of merchantable goods, by adding sugar and the process that they generally use.

Q. Did you assist in doing that? A. No, sir.

(Testimony of Wilbur P. Reid.)

Q. Now, these goods that were shipped to C. L. Jones & Company, I believe, and to Kasper and Durand, you remember about those, do you?

A. Yes.

Q. What condition were those goods in, so far as outward appearances were concerned, when they were shipped?

A. They were in good condition outwardly.

Q. Had they been well frozen before they were shipped? [281]

A. They had been frozen for several weeks.

Q. Were the barrels cleaned up?

A. Not washed, no.

Q. Not washed?

A. They were just the way they were when they were shipped out.

COURT.—What shipment were you referring to?

MR. BOOTHE.—To C. L. Jones & Company.

MR. SPENCER.—No shipment shown to C. L. Jones & Company; that is the name of the broker that makes the sales in Chicago.

MR. BOOTHE.—Isn't that the name of the company Mr. Theis spoke about?

MR. SPENCER.—That is Sexton & Company.

MR. BOOTHE.—That is Sexton & Company. I beg your pardon, that is right, your Honor; I believe the shipment was made to John Sexton & Company; that was two hundred barrels, I believe.

COURT.—Shipped on the sixteenth of November as the shipping receipts show.

(Testimony of Wilbur P. Reid.)

Q. Now, will you state what condition those barrels were in when they were shipped?

A. We never shipped a barrel that was leaking or bad outward condition. We had a railroad checker from the railroad company right there when we were loading; every barrel was checked by the railroad checker and also by our foreman and if there was a barrel came up the elevator that was not suitable for loading, why, it was returned to the basement.

Q. Was Mr. Van Doran there?

A. Mr. Van Doran was there at the loading of one—I think he was at that time; at one particular time he was there by request by our letter we had written Van Doran.

Q. Those that went to Sexton & Company were frozen when they were taken out, you say?

A. Yes. [282]

Q. And were they put into a refrigerator-car?

A. Yes.

Q. Do you know what degree of temperature they had in the refrigerator-car?

A. No, I don't. In that connection I would say that the cars as they come in are re-iced and salted and they are pre-cooled as far as possible; we ice the cars before they are loaded and after they are loaded, if they need any additional ice and salt before they are pulled out of the plant on the siding, why, they are fully iced when they leave us. As far as the temperature inside the car, I do not know that.

(Testimony of Wilbur P. Reid.)

Q. Do you remember the shipments—the two shipments that went to Durand & Kaspar?

A. Not in particular. I followed the same instructions for all loading. All good barrels should go and those that were not should not go. We had, as I said before, a complete check, gross, tare and net and the number on each barrel recorded as it went into the car.

Q. Now, as to the time Mr. Baker had a conversation with you when he was wanting you to pay damages he claimed for those goods; you heard his statement of that fact. State what the conversation was, as you understand it.

A. Mr. Baker and I went together in the basement there on the seventeenth and he expressed that they were in poor condition and I didn't think that they were. He says "We would better go upstairs and talk with the other member of the company, William Reid." And so we went upstairs and found William Reid. And Mr. Baker said that the temperature was thirty-six and entirely higher than he wanted and I had some talk, I said something about the ice and had ice to supply the icing of the cars to the railroad; that I used my best judgment to take care of the barrels in the cold storage and also for the ice. I don't recall any further conversation at that [283] time. Mr. Baker left—left the office. And then later, the same day that we had a meeting at the Hotel Benson, Mr. Baker was over there at our office at that time and he told us, explained that he wanted us to guarantee a price of seventeen and

(Testimony of Wilbur P. Reid.)

a half cents; the difference, in other words, between what he would sell the loganberries in the Eastern market and the price of seventeen and a half cents; the difference he wanted us to guarantee him. I says, "Well, we will have to talk with the other member of the Company, Mr. William Reid," and so we did. But we did not agree to do any thing of the kind; we didn't say—I didn't say at any time that I would guarantee that seventeen and a half cents. I said before we would take it up further we wanted to take it up with our attorney, Mr. Boothe, and I suggested that we have a meeting somewhere. He said at the hotel and the meeting was arranged that evening at the Hotel Benson. Mr. Boothe was with us at the meeting, and at that meeting we didn't agree to guarantee Mr. Baker for the loss that he stated that was made at our plant on the temperature and all of that. Mr. Boothe stated that he would not agree to any such proposition and that was the end of the meeting.

Q. Now, during that conversation did your father speak of or say anything, ask Mr. Baker any questions? A. Yes.

Q. What did he say?

A. He said—he stood up, as I remember, and he made a gesture and he said, "Mr. Baker, if I owe you anything for damages tell me what it is; if we are in any way in fault," and, he says, "how much do I owe you?" and Mr. Baker says: "I don't know," and there was no settlement of any kind.

Q. That was the end of the meeting, wasn't it?

(Testimony of Wilbur P. Reid.)

A. That was the end of the meeting, yes. [284]

Q. Did you at any time tell him that if you had damaged his goods by any of your negligence, carelessness, you would pay for it? A. Never did.

Q. Now, were there any other goods of the same kind in cold storage at the time this temperature for one day went to thirty-six degrees? Were there any other goods of the same kind there that were not damaged?

A. Yes, we had another lot there. That was about the same condition as Mr. Baker's lot there was a portion of them that came in bad; fermenting; some of them showed signs of fermentation in very much the same condition that Mr. Baker's stuff. Some of that was in good condition at the time when it went out.

Q. And were there any other goods there that did not show signs of fermentation—goods of the same class?

A. No, I would say that stuff that went in in good condition, that it came out in good condition.

Q. All of it that had not fermented came in in good condition, did it? A. Yes.

Q. Didn't ferment when this temperature went up to thirty-six degrees for the day?

A. Didn't show any signs of fermentation. The good barrels that went in didn't show any added signs of fermentation.

Q. Now, the goods that were received were taken in some time by one man and some time by another; did you examine those receipts that were passed

(Testimony of Wilbur P. Reid.)

in yesterday and make some estimate as to the number of barrels that were received by certain parties? A. Yes.

Q. Just state, how many did Mr. Patton take in?

A. Yesterday I had the receipts for the Willamette Valley Transfer Company, they were on the desk there. I went over all the receipts. It is customary for our warehouse men to sign the receipt when the truck driver, whoever received the goods at our plant, and then the truck driver would retain that ticket showing the signature. Now, [285] yesterday I went over the list and there were three men that received all of the goods during *the* 1920 by truck. Our night foreman, Mr. Horne, Mr. William Horne, received 1113 barrels between six o'clock P. M. and six o'clock A. M. the next morning and six P. M. there was 607 barrels received at our cold storage.

COURT.—How many barrels during the night?

A. 1113. Mr. William Reid, Mr. E. L. Patton and Mr. O. L. Kennedy are the three men that signed for the goods in the day time. None of those three men signed for any goods at night.

COURT.—How many were received in the day, Mr. Reid?

A. 607; a total number of 1720.

Whereupon recess was taken to 2:00 o'clock P. M.

(Testimony of Wilbur P. Reid.)

Portland, Oregon, June 14, 1922,
2:00 P. M.

WILBUR P. REID resumes the stand.

Direct Examination (Continued).

(Questions by Mr. BOOTHE.)

Mr. Reid, you have stated something, generally, about the number of barrels in this lot of 398 which did not ferment during the time this temperature went up. Did you make some statement on that? Do you now recall how many barrels there were that didn't ferment?

A. I made a statement just before recess, the last answer I made. Did I refer to that again?

Q. I don't remember. I am asking this for my information; if I have asked you that and you have stated I don't care to state it again.

A. I have a record of 231 number one good barrels in the basement now, of that lot of 398.

Q. Now, of these that were in this damaged condition, as they say, were any of those holdovers, as you call them? [286]

A. Yes, they were some holdovers.

Q. The accumulation of shipments at different times, is that right? A. Yes, sir.

Q. Did you have conversations with the drivers at any time when they brought those goods in as to what length of time they took to bring the goods in?

Mr. SPENCER.—Now, I think the drivers were not confronted with such a statement.

(Testimony of Wilbur P. Reid.)

COURT.—I think that is correct.

Mr. SPENCER.—It is only fair to let the drivers know, I believe.

Mr. BOOTHE.—Well, we will leave that out, then.

Q. Now, have you any statement, then, as to how many barrels there are, then, that were blown and in a fermented condition?

A. I have 143 number two, with the heads splintered and nail holes in the heads and 24 barrels called number threes; heads out entirely, making a total of 398 for the number ones, twos and threes.

Q. When were those heads blown out?

A. Most of them before they went into storage; the majority, some of them were forced out when the freezing process, after the temperature went down after the seventeenth of August.

Q. Before you could get them frozen, then, some of the balance of them were forced out, is that it?

A. When they were re-frozen the contents expanded and forced out the heads that were formerly weakened.

Q. I think that is all the questions I have, unless you think of something yourself, Mr. Reid, that you want to state that I haven't gone over.

A. Well, there are other matters may come up on cross-examination.

Cross-examination. [287]

(Questions by Mr. SPENCER.)

Referring to this last subject that you have just

(Testimony of Wilbur P. Reid.)

mentioned, now, Mr. Reid, you say there are 231 of number one barrels?

A. Yes; 231 number one good barrels.

Q. And you have some list before you?

A. The list I have is marked on this sheet here, which is a record of barrels received; it is a memorandum from the foreman's record that he has furnished us in our office.

Q. Did you make up that list? A. I did not.

Q. And when you say there are 231 number one barrels, what do you mean by number one barrels?

A. Number one barrels are ones that show no signs of bursting and no signs of breaking the heads or the staves.

Q. I understand you to say that those barrels, ever since this occurrence in August, 1920, have been—when you got the temperature back down have been kept under refrigeration of twenty-four to twenty-six degrees? A. Yes, sir.

Q. You would not undertake to say from your own knowledge that those 231 barrels are absolutely unfermented stuff, would you?

A. I didn't say that they were not fermented.

Q. You call them number one barrels?

A. They are number one, ready to ship and merchantable.

Q. But as to the contents of those barrels you don't know anything about that at all, of your own knowledge, do you?

A. Not the exact test, no.

Q. And these number two barrels that you have

(Testimony of Wilbur P. Reid.)

classified here as number two, 142, what did they say was the matter with them?

A. I believe I stated that 123 had heads splintered and nail holes in the heads.

Q. Does your record there show when those heads were splintered and nail holes put in? [288]

A. Happened during the whole time, between the time of entry until to-day.

Q. And starting in the first of August, 1920, they have been in there two years, practically?

A. I would say that there had been none splintered or further damaged since August—about August 20, 1920; they are in the same state to-day as they were then.

Q. And the number three—you classify a third branch as number three barrels, 24 in number—

A. Yes, sir.

Q. And those you say the heads are out?

A. Heads are out.

Q. Are they out now? A. Yes.

Q. And when did the heads blow out on those? Does your record there show?

A. That happened during the entire time, from the time of coming in.

Q. Your record does not show when the heads went out on those? A. This record does not show.

Q. And your record does not show when the 123 so called number two barrels had their heads splintered? A. Not the exact time, no.

Q. So far as you are personally concerned you don't know any more about the contents of the

(Testimony of Wilbur P. Reid.)

barrels you call number one barrels than you do about the contents of the number two and number three barrels, from your own inspection?

A. When I say the barrels are graded in three different ways it is according to appearance and shipping condition of the barrels. They have to be re-coopered when moved.

Q. You don't undertake to grade the contents?

A. I don't grade the contents on that.

Q. Now, let us start back somewhat at the beginning of this thing. You say that when Mr. Baker made arrangements or started to ship barrels [289] in 1920, that no particular agreement was made as to temperature, or, rather, no particular request was made by him on you as to the temperature to be maintained. Well, you would not think it was necessary for Mr. Baker every year, when he started in down there storing barrels with you, to come around and name the particular temperature when you had been doing business the year prior, would you?

Q. Yes, I would expect that he would give us instructions, naturally.

Q. Well, you said that some two or three years earlier, I understood you to state that he had told you that he wanted those barrels put under freezing and kept under freezing, is that right? A. Yes.

Q. And he told you, didn't he, in the beginning, that he wanted the barrels always kept under a temperature which would be freezing?

A. Yes, in previous years.

(Testimony of Wilbur P. Reid.)

Q. Well, what is freezing, and what temperature is freezing?

A. Well, thirty-one, and any temperature colder than that.

Q. Well, with that understanding, or that request in previous years, do I understand you to say now that the matter of temperature was just left open, there was no understanding on your part at all as to what temperature should be maintained?

A. Well, I don't think there was any definite temperature mentioned.

Q. Then, you just ran whatever temperature you might please there, is that the idea?

A. Whatever in my judgment would hold the berries.

Q. You want us to understand, then, that, notwithstanding that previous arrangement with him and understanding with him, when he started to ship in 1920 you thought it was all right for you just to use your judgment? A. Yes, sir.

Q. And if you found what seemed to you a greater need for the juice on some other part of your plant, why, if your judgment told you to use it over there and let the storage-room go, it was all right to do [290] it; is that right?

A. It was hardly that way, no.

Q. What kind of temperature—

A. Whether the temperature I thought would hold the berries. I believed at all times that the berries would keep and not be damaged to any great extent.

(Testimony of Wilbur P. Reid.)

Q. He never told you that the berries would not be damaged if you allowed the temperature to go to thirty-six, did he? A. No.

Q. He told you in the beginning that he wanted the berries kept under freezing, didn't he?

A. In the beginning, along about 1918.

Q. Now, this rate of \$1.15 a month covered freezing of those berries, didn't it? A. Yes, sir.

Q. But did you have a freezer-room over there at the time?

A. At that time we did not have a room upstairs; we put the barrels down in the basement.

Q. Have you got a freezing-room now?

A. Now, we have.

Q. A separate room? A. Yes.

Q. You had the berries in a separate room?

A. Yes, sir.

Q. To freeze them? A. Yes, sir.

Q. What degrees of temperature did you put them? A. Twenty-six.

Q. How long to hold them there, to freeze them solid, would it take?

A. Take about two or three weeks to freeze them solid, and even then you cannot drive it all the way through the barrel.

Q. Then you move them down, do you, to the other room? A. Yes.

Q. And what degree of temperature do you maintain there?

A. It is about the same temperature.

Q. What is the difference between the two rooms?

(Testimony of Wilbur P. Reid.)

A. Not a great deal in temperature.

Q. Why do you call one freezer and the other room—what do you call the other room downstairs, now? [291]

A. That is a freezer.

Q. Well, don't you have some other name you apply to it? Isn't that the storage-room?

A. No, it is cold storage, freezer-room.

Q. Why do you run them into this room upstairs first, then, now?

A. Well, it is a little bit handier, it is on the first floor.

Q. Well, you have to move them downstairs sooner or later, don't you?

A. Not if we have small quantities.

Q. Well, when you are storing larger quantities.

A. We use the basement then.

Q. Do you run them in there first?

A. Sometimes we do, yes.

Q. Do you always do it?

A. It depends on how much space is available.

Q. And as a matter of fact you put your berries now in this freezer-room first of all?

A. During 1920 we didn't.

Q. You didn't have a freezer-room then; did you have a freezer-room in 1920?

A. Not on the first floor; freezer-room in the basement in 1920.

Q. Now you put your berries or whatever it is in the freezer-room first? A. Yes.

Q. On the first floor? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. And when it is thoroughly frozen you move it down to the big room, don't you?

A. At the present time.

Q. And as a matter of fact you subject the room you move into, the room upstairs, to a much lower temperature to freeze it? A. Yes.

Q. And how low do you run it down in order to get it thoroughly frozen? Sixteen, something like that? A. Yes, now it is sixteen.

Q. And you put it into the small room and thoroughly freeze it, we will say sixteen degrees, and when it is thoroughly frozen you move it downstairs to the big storage-room? A. Yes.

Q. And in the big storage-room if the temperature does vary a few degrees for a short time it doesn't make so much difference, because it is frozen solid through, isn't it? A. Yes. [292]

Q. Now, these barrels that you had there in 1920, you were moving into this large room downstairs new berries all the time, every day, weren't you?

A. Yes, sir.

Q. And that necessarily required—should have required a good deal closer attention to the temperature of the room, didn't it? A. Yes.

Q. Because the effect of moving in new berries in a refrigerator tends to run up the temperature in the big room, doesn't it? A. It does, yes.

Q. These—you have mentioned barrels, you gave some percentages there, ten per cent, you said, of barrels were bad and fifteen per cent you put nail holes in them to keep them. I didn't get from you

(Testimony of Wilbur P. Reid.)

Mr. Reid, a clear idea of when you claim that started, that ten per cent bad. Right at the beginning? A. Yes, upon arrival from the trucks.

Q. From the beginning of July, when the first shipments were made, you claim ten per cent of the barrels when received were bad?

A. I am saying that ten per cent of the total for the season came in in a damaged condition.

Q. I want to get what your idea is about the time on this thing. The shipments started here along in the early part of July, didn't they?

A. Yes.

Q. And is it your idea that, beginning right with the earliest shipments in July, that ten per cent of the barrels received were bad?

A. Not at first. The first part of the season the outside temperature was not as hot, the berries were firmer and we did have considerable good barrels; the average did not run as high.

Q. Let us get some idea, some definite idea, about what your notion is on that. When, then, did the ten per cent of berries bad on receipt begin? When did that commence?

A. Well, about the first of August. [293]

Q. Well, then for thirty days— A. Yes.

Q. For thirty days the berries that came in were in A-1 condition? A. During July.

Q. All in July. Now, as a matter of fact there were over thousand barrels of berries went in there in July; is that true?

A. Well, about that, I think.

(Testimony of Wilbur P. Reid.)

Q. Then this ten per cent bad started in along about the first, you claim, of August? It that right?

A. Well, we had some in July. I have a record of some that blew up in July.

Q. Well, how much—how many. I am trying to get at your idea when this receipt of ten per cent bad—

A. I am saying that the ten per cent is for the whole season.

Q. I want to get some idea of the time.

A. During July the percentage was not as high. We did have quite a number of barrels in poor condition come in in July, but the most of them, the greater portion of the fermenting and blowing up and heads off and all of that came in the month of August.

Q. When did this ten per cent, when the berries that you received, the July shipments of berries, begin to run ten per cent bad on receipt?

A. Well, about the first of August.

Q. Would you be sure it was the first, or three or four days each way, three or four days earlier or three or four days later?

A. Well, in looking over the records, along the first part of August.

Q. First part of August; that is about as definite as you could make it, about the first week in August?

A. Yes, sir.

Q. And that situation, I suppose, is true as to the fifteen per cent that you say you had to put nail holes in, is it not? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. That started in during the first week of August. Now, you say [294] that prior to that time there were some that came in bad?

A. Yes, sir.

Q. Were bad when they were received?

A. Yes.

Q. Well, Mr. Baker had written to you on the fifteenth of July that—I am referring now to Plaintiff's Exhibit 3, saying, "We are storing barrels with you and wish you would wire this office at any time any of the barrels show distress." Did you ever wire Mr. Baker with reference to a single barrel that showed distress?

A. I didn't wire, but I wrote a letter.

Q. When did you write a letter? Have you the letter? A. The letter is right there, yes.

Q. Is it the letter of August ninth?

A. Yes, sir, that is the one; yes, August ninth.

Q. You are now referring to Defendant's Exhibit "D" for Identification?

A. That is the one, about the fifty barrels.

Q. Referring to the fifty barrels? A. Yes.

Q. That is the first letter you wrote Mr. Baker about distressed barrels? A. Yes.

Q. And yet you say now that prior to August first, in the month of July, that at various times there were distressed barrels coming in, barrels that were in bad condition when you got them there?

A. I do, yes. They were in bad condition came in right along.

Q. Yet you didn't notify Mr. Baker about it?

(Testimony of Wilbur P. Reid.)

A. No.

Q. Either by wire or letter until this letter of August ninth?

A. There would be a continual wire all the time if I had.

Q. You could have wired Mr. Baker at his expense, couldn't you?

A. By writing a letter he knows the condition. We have had barrels other years and they were blowing up then, too.

Q. He said in this letter, again: "Should any of them commence to bulge at the head take a six or eight penny-nail, drive it through the [295] head three or four times, withdrawing it and allowing the gas to escape—and at all times notifying me and Van Doran." Now, did you notify Mr. Baker about any of these barrels prior to the letter which you wrote on August ninth?

A. No, and didn't wire. I followed the instructions about the nail holes, to prevent—so the barrels would not blow up with the gas accumulated.

Q. You realized this was Mr. Baker's property, didn't you?

A. We were taking care of his property, yes. Yes, I will answer that.

Q. And you realize that Mr. Baker had probably more interest in this property than any other man in the world, and yet you didn't wire him and did not notify him, although you now say that barrels were coming in there showing distress prior to your letter of August ninth? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. You referred in your testimony this morning, Mr. Reid, to some book record that was kept showing the bad order of the barrels when received?

A. Yes, that book record.

Q. Did you keep that?

A. No, but our foreman, Mr. A. L. Patton, kept that.

Q. And Mr. Patton you say wasn't there at night?

A. He was there during the day and checked over every barrel himself.

Q. And who made up the receipts which were issued to the truck drivers as they brought the loads in? A. Four different men.

Q. And you have already mentioned the names of those men? A. Yes.

Q. The right man was Horne? A. Yes.

Q. And then when would these warehouse receipts which you mailed to Mr. Baker be made up.

A. They were made up during the day.

Q. That would be the next day. A. Yes.

Q. The day following the receipt?

A. The barrels that came in at night were rolled into the basement and left in the centre of the basement and Mr. Patton in the morning would go down and check over every barrel, according to the condition [296] of the barrel, and the weights, and he would report to the office and the warehouse receipts issued for so many barrels each day.

Q. Now, for example, in Plaintiff's Exhibit 2, I just selected one here, July 20, 1920, is a receipt

(Testimony of Wilbur P. Reid.)

received by H. A. Baker, 116 barrels loganberries, lot No. 8903; that is signed National Cold Storage & Ice Company by E. L. Patton, and would represent, as I understand, the accumulation of barrels during the previous—

A. Previous night?

Q. —night, and the next morning, for example, on the night of July 19th, this being dated July 20—on the night of July 19th these barrels would all have been accumulated there and the next—on the morning of the 20th, Mr. Patton would go down and look them over and count them up and enter the total number on this warehouse receipt and then that would be mailed to Mr. Baker?

A. Yes, sir.

Q. And that was the course that was followed from the beginning of the season, which, according to this receipt, started July 8, 1920 and ended on August 19, 1920?

A. Yes. Now, I might add that Mr. Horne, the night man, stayed until six in the morning; Mr. Patton goes on at six and they interchange at the same time. If anything unusual, anything happens, any number of barrels showed distress, he told Mr. Patton right there all that went on that night and Mr. Patton would write out the written warehouse receipt the next morning.

Q. But day by day these were made out and mailed to Mr. Baker? A. Yes.

Q. Now, was it your practice down there to head

(Testimony of Wilbur P. Reid.)

up barrels, do your own coopering on Mr. Baker's barrels? A. No, we didn't.

Q. Well, who did the work?

A. Why, they were taken as they were, all classes of barrels put into the basement, and when they accumulated, why, we wrote to Mr. Baker or Mr. Van Doren to send us a cooper down there. [297]

Q. Well, let us see now. The first letter you wrote to Mr. Baker about having any barrels fixed up was on August 9th; that is true, isn't it?

A. Yes; there had been some accumulation of barrels at that time, yes.

Q. Do you mean to say you allowed barrels to stand around there with no heads on them without notifying Mr. Baker or Mr. Van Doren?

A. They were frozen just the same.

Q. They were frozen just the same without the heads, without any cover?

A. The barrels would freeze the same without any heads; we took the barrels in as they were.

Q. How did you happen to notify Mr. Baker on August 9th that you had on hand now about fifty barrels that had blowed and as you had orders to ship these out you suggested that he send somebody down to re-cooper them; how did you happen to write that letter on August 9th?

A. They were not ready to ship out, we could not ship a barrel that did not have a head in it.

Q. Well, the point about it is that you had just gotten around to the time you wanted to ship those barrels and you could not very well ship them

(Testimony of Wilbur P. Reid.)

without heads, so you asked him to come down and re-cooper them; is that right?

A. Yes, that is right.

Q. I understood you to say in your direct examination that you maintained a temperature in that room of about twenty-four to twenty-six up to about the first of August? A. Yes.

Q. And I understood you to say that up to that time the basement—everything was fine down there?

A. Yes.

Q. The basement was clean? A. Yes.

Q. Any signs of bubbling barrels?

A. Some, yes.

Q. Some?

A. Some that had been immediately put in four or five days, that had been fermenting and put down, they didn't stop entirely from fermenting [298] for four or five days.

Q. Do you want the jury to understand when Mr. Baker came on the 31st of July there was bubbling on the tops of some of the barrels, the tops of the barrels were stained?

A. They were not bubbling, exactly, but the barrels would show where the heads were out, some damaged barrels.

Q. Mr. Baker went down into the cold room at that time, didn't he? A. Yes.

Q. Did you go with him?

A. I didn't go with him on the first of August.

Q. You didn't go with him at that time?

A. Not at that time; no, sir.

(Testimony of Wilbur P. Reid.)

Q. The 31st of July?

A. Thirty-first of July, I wasn't with him at that time.

Q. Well, now, I understood you to say that about on the fourth of August you had some use for your juice in other parts and you used your judgment and you began—you took the temperature, some of it, from the cold room, the room where the barrels were stored; that is true, isn't it? A. Yes.

Q. About the fourth of August that started?

A. Yes.

Q. And then I understood you to say that on the—when Mr. Baker came down there the second time—you remember the time he came on the last day of July, do you?

A. Well, that point is not quite clear; I have been thinking of that since I answered that question before. I was with Mr. Baker one time when we had only a few barrels and I think that that was in the early part of the season. I don't think I was with him on the thirty-first of July.

Q. You don't think you were with him on the thirty-first of July?

A. But there was one time I was. I was with him at the first part of the season. [299]

Q. You think that may have been still earlier in July? A. I think it was.

Q. But you were not with him on the thirty-first of July? A. I don't recall that.

Q. And then you were with him when he came down in August?

(Testimony of Wilbur P. Reid.)

A. August seventeenth I was with him.

Q. That is the time that you say that he said that it made him sick to see that?

A. Yes, I was with Mr. Baker at that time, yes.

Q. And that was the day you say that the temperature was thirty-six? A. Yes.

Q. And you say that just happened, that Mr. Baker dropped in the time the temperature got to thirty-six?

A. That was the day the temperature got the worst, yes.

Q. How did it happen, do you suppose, that Mr. Baker dropped in down there the day you say the temperature got the highest?

A. It just happened that way, with Mr. Baker, I guess.

Q. Now, your temperature had started up on the fourth of August, hadn't it?

A. Yes, fourth of August.

Q. And you are absolutely sure, are you, Mr. Reid, you have thought over it pretty much, you are absolutely sure?

A. There is a record there of the temperatures.

Q. I want to know about your visit with Mr. Baker; are you certain when Mr. Baker and you went down into the basement that the temperature was thirty-six?

A. Yes, we both looked at the thermometer at that time, on the seventeenth.

Q. You both looked at the thermometer, you and Mr. Baker? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. Did you talk about it?

A. He said, "That is entirely too warm."

Q. And it was thirty-six? A. Yes. [300]

Q. Now, you are not mistaken about being with Mr. Baker at that time, are you?

A. No, I am certain.

Q. He was there and you were there and you both looked at the thermometer? A. Yes, sir.

Q. And it was thirty-six?

A. That was the only one day that it was thirty-six. Previous to that and after that it was colder, as the temperature record will show.

Q. Now, Mr. Reid, suppose it should happen that Mr. Baker was down there on the 20th of August, then the same thing is true, isn't it, the temperature was thirty-six?

A. No, it wasn't; it would be whatever it was at that time.

Q. I want to be certain that you are certain that Mr. Baker and you together went down in the basement and the temperature was thirty-six as you looked at the thermometer.

A. Thirty-six on that one day, when we were there together, yes.

Q. Do you remember when Mr. Van Doren came down with Mr. Ireland? A. Yes.

Q. What was the temperature then?

A. Thirty-five.

Q. Thirty-five that day?

A. That was on the sixteenth.

(Testimony of Wilbur P. Reid.)

Q. Well, now, what is your present recollection as to the date when Mr. Baker was here? Isn't it a fact, Mr. Reid, that Mr. Baker was here on the 20th of August? Mr. Baker wasn't at your place at all on the sixteenth, the seventeenth, was he? A. Well, let's see—

Q. Mr. Van Doren and Ireland were there on the sixteenth, weren't they?

A. It might have been around the twentieth.

Q. Then you think that it was the twentieth? Mr. Baker has already testified he was down here on the twentieth and went down to your plant; you have no reason to dispute him on that, have you? You think that was the date? A. Yes.

Q. And the temperature that day was thirty-six; you say that the temperature on the sixteenth, when Van Doren and Ireland were down [301] there was thirty-five? A. Yes.

Q. Did you go down and look at the thermometer with Van Doren?

A. The day I mentioned it was thirty-six was when Baker and I was there together; if that was the twentieth that is the day.

Q. Mr. Baker said it was the twentieth.

A. And if I stated before it was the seventeenth I must correct that.

Q. That is all right.

A. It was the day we were there it was thirty-six.

Q. I don't care to trip you at all on that date, Mr. Reid; if it was the twentieth, and I think it

(Testimony of Wilbur P. Reid.)

was, let us agree it was the twentieth when Mr. Baker was here. A. On that day, yes.

Q. And Van Doren and Ireland had come down on the sixteenth? A. Yes.

Q. Do you recall receiving this telegram, Plaintiff's Exhibit 4, from Mr. Baker, where he said, "Van Doren wires me that temperature of room is up to thirty-six." This telegram is dated August sixteenth. "Van Doren wires me that temperature of room is up to thirty-six" and then so on. He says, "You know you will be liable for any loss at this temperature. Each barrel is worth about seventy dollars." Do you remember getting that?

A. I think I do, yes.

Q. It says, "I beg you to get the temperature down to twenty-six or lower." Then you may be mistaken, the temperature may have been thirty-six on this sixteenth of August, instead of thirty-five? At any rate it was around about that figure?

A. If you want the exact temperature from the records—

Q. I am asking you now. You have testified about what took place over there.

A. Well, on the seventeenth around thirty-six.

Q. Was that the temperature?

A. Thirty-five.

Q. So that the temperature was around thirty-five or thirty-six, then, on the sixteenth of August and it was thirty-six on the twentieth of August, wasn't it? A. Approximately yes; yes.

Q. Well, it didn't go down in the meantime, did

(Testimony of Wilbur P. Reid.)

it? You didn't run [302] it down to twenty-four or twenty-six between the sixteenth of August and the twentieth of August? A. No, I did not.

Q. Now, when did you get the temperature down to twenty-four or twenty-six again after the twentieth of August?

A. After receiving that telegram I immediately made special pressure on the ammonia and we brought it right from that time on; it kept gradually getting colder.

Q. How soon did you get it down to twenty-six?

A. Why, a degree or two each twelve hours.

Q. On the 25th of August you wrote Mr.—no, I beg your pardon.

A. I sent a wire a few days after that.

Q. On the 21st of August—21st day of August you sent a wire saying "Temperature basement now 27."

A. After receiving his message on the twentieth I made special effort to put the temperature colder, and after about twenty-four hours, why, we succeeded in getting the temperature down, as I stated in my wire to him.

Q. In order to do that you took the refrigerator off the ice tank? A. Yes.

Q. You had had the refrigeration on the ice tank during that time, hadn't you?

A. Yes; not entirely, but partially so.

Q. That is what caused this trouble, wasn't it?

A. Partially so, yes.

(Testimony of Wilbur P. Reid.)

Q. So that we have the situation then, where the temperature started up on the fourth of August, didn't it? A. Yes.

Q. Started to climb, and on the sixteenth of August it was hovering around thirty-six?

A. Thirty-five and thirty-six.

Q. And it was thirty-six on the 20th of August?

A. I believe so, yes.

Q. Then you started it down? A. Yes.

Q. And on the 21st of August you think you had it to twenty-one? [303]

A. No, not that cold; about twenty-seven.

Q. Twenty-seven, I should say; twenty-seven. A drop in temperature from thirty-six to twenty-seven would be about—I am not very good at subtraction, how many degrees would that be?

A. Difference between twenty-seven and thirty-six.

Q. Yes; is about seven degrees—nine degrees.

A. Is about nine degrees.

Q. Do you think you dropped the temperature that many degrees in twenty-four hours?

A. We did, yes.

Q. You could do that, could you?

A. Do that by special effort, yes.

Q. Then if you could do that by special effort on the twenty-first day of August, why didn't you use that same special effort when Mr. Baker wired you on the sixteenth of August, begging you to get the temperature down?

A. Well, each day as the temperature was

(Testimony of Wilbur P. Reid.)

dropping, I figured on bringing up the temperature, making it colder—or dropping the temperature, making it colder each day, and the demand for ice kept increasing and I was not able to do that. Just at the time when I would figure on putting special effort on to the cold-storage room there was an extra added demand for ice and each day I thought it would be the next day that we could get on that pressure.

Q. So you just kept putting it off and putting it off and the thing remained that way until you finally got it back by this special effort? That is right, isn't it? A. That is right.

Q. After this experience, which that telegram of August 21st indicated brought the temperature down to twenty-seven, when did the bubbling or sizzling or whatever took place there—when did that stop?

A. That didn't stop—Oh, it was more than a day there was some activity in the barrels. [304]

Q. More than a day; well, how long was it?

A. Well, two or three days before everything was entirely stopped.

Q. And then you had some figure here, some percentage, a sixty-five per cent—did I understand you to say that when Mr. Baker was there that about sixty-five per cent of the barrels were bubbling? A. No.

Q. That is after the temperature had gone up?

A. No, I didn't say that.

Q. You had a figure, sixty-five.

(Testimony of Wilbur P. Reid.)

A. I said sixty-five per cent of 398.

Q. Well, sixty-five per cent of 398 were bubbling. A. No, you haven't got that right.

Q. What is this sixty-five per cent?

A. Sixty-five per cent of the 398 are in poor condition, not ready for shipment.

Q. When was that?

A. That is at the present time.

Q. Well, what percentage of the barrels that were in the basement when Mr. Baker was there on the 20th of August were showing distress, all of the barrels that were there?

A. All of the barrels were not showing distress?

Q. I say what percentage?

A. Well, the percentage would be a little more than sixty-five per cent at that time.

Q. Well, what would it be?

A. Around about seventy-five per cent.

Q. About seventy-five per cent of the barrels on August 20th, when Mr. Baker was there, were showing distress? A. Yes.

Q. And then what did you do with those barrels after he went away? What did you do with the room?

A. After he went away the temperature was brought down colder.

Q. And then what happened?

A. And the floor was cleaned up and everything was just as stated in the telegram. [305]

Q. Well, then, didn't I understand you to say

(Testimony of Wilbur P. Reid.)

that when you froze that stuff the second time that the heads bulged from freezing?

A. Yes, on some of them.

Q. How soon did that happen?

A. Just as soon as the contents was frozen enough to expand and push up the heads; that would not happen immediately.

Q. Well, how long did that happen after you got the barrels frozen?

A. It would take several days to do that; it would take at least a week to do that.

Q. Let us start at the beginning of that; if you had the temperature down to twenty-seven degrees on the twenty-first of August, how soon do you think the bubbling would stop and the barrels be frozen?

A. The bubbling would stop within a day.

Q. And the barrels were frozen how soon?

A. It would take a week at least to freeze the contents so that you would stop the activity.

Q. And then how soon did the bulging of the heads start in? A. During that period of a week.

Q. During that period of a week; so that from the time—you say that a week, outside time, would cover the period in which that bulging of the head would develop? A. Yes, to a great extent.

Q. During the period of the week in which those barrels were frozen the second time?

A. And the harder and longer you freeze the more expansion until it is all frozen; be some blew up perhaps over the week's period.

(Testimony of Wilbur P. Reid.)

Q. Now, Mr. Reid, if that be true, why was it— if these barrels were in such bad condition when they were received by you—some you say that was bad in July and that there were some of them that were not bad, top fermented—claim has been made here that they were sizzling and bursting and so on, even in July? A. Yes, sir.

Q. Why didn't the heads bulge from freezing throughout the month [306] of July, in, say, a week's time after they were frozen, if they were in such a bad condition when you got them?

A. Well, I think there were some; we had some at all times that were doing that.

Q. Well, did you notify Mr. Baker about those?

A. No, not in particular.

Q. Now, according to your notion there are 213 barrels down there that are merchantable now, you said? A. Well, I made it 231.

Q. Was it 231? A. Yes.

Q. Well, I beg your pardon. You think they could be sold and command a price that normal loganberries packed in barrels would command; is that your idea?

A. Why, they would bring the merchantable price, if re-processed.

Q. If re-processed? A. Yes.

Q. Well, do you know anything—have you had any experience in re-processing fruit?

A. Yes, we had two of those barrels re-processed for a test.

Q. That is the extent of your experience in re-

(Testimony of Wilbur P. Reid.)

processing fruit, such as this, two barrels out of this lot? A. Yes.

Q. You have not been in the fruit business yourself, Mr. Reid? A. No.

Q. Have not engaged in buying or selling fruit?

A. No.

Q. Now, as a matter of fact, all of that stuff there, the 398 barrels, was offered for sale, wasn't it?

A. Yes. At any particular time, do you mean?

Q. Well, during the period I think the year of 1921. As a matter of fact it was offered for sale to pay the taxes on it, wasn't it? A. Yes, sir.

Q. The taxes were not paid and the public offering of that stuff was made to pay the taxes, wasn't it? A. Yes. [307]

Q. And you bought it in, didn't you?

A. Yes, sir.

Q. For the taxes? A. Yes, sir.

Q. And there wasn't anybody that had enough confidence in it to come and make a bid on it and buy it, was there, except yourselves?

A. Well, the idea we bought it in in order to protect ourselves, as well as Mr. Baker.

Q. Well, was there anybody that offered any more money than you did?

A. Not at that time, no.

Q. How much did you bid it in for? About eleven hundred dollars, wasn't that the taxes?

A. I think so, yes, approximately.

Q. You bid it in for the taxes?

(Testimony of Wilbur P. Reid.)

A. We wrote a letter to the effect that we didn't want the goods, we merely bid it in to protect Mr. Baker, so that no outsider would get hold of it.

Q. Mr. Baker didn't ask you to bid and to protect him, did he? A. No, he didn't.

Q. And the goods were subject to sale for whatever they might bring on the market, weren't they?

A. At the tax sale.

Q. And nobody bid against you, did they?

A. No.

Q. These barrels, Mr. Reid, that were shipped to John Sexton & Company, I understood you to say that they were in good condition?

A. Good shipping condition, yes.

Q. You remember the shipment, do you? The shipment to John Sexton & Company? It is the one covered by the first deposition. A. Yes, I do.

Q. And do I understand you to say that the barrels were in number one condition?

A. The barrels were in number one condition, yes, shipping order. [308]

Q. And were there any nail holes in the barrels? A. All been plugged up.

Q. Did they bubble? A. No, sir.

Q. Were there any stains on the barrel?

A. Some stains, yes.

Q. To such an extent that the railroad company made a notation on the bill of lading that there were stains on the barrels?

A. It might have been the surrounding barrels

(Testimony of Wilbur P. Reid.)

that put the juice on the floor and when they were rolled got stained.

Q. Might have been, and yet might have come from the same barrels, too, that is true, isn't it?

A. I hardly think it.

Q. You hardly think it, but you don't know but what the stains might have come from the same barrels?

A. Might have been from the nail holes, nail holes oozed up and then they were plugged up afterwards.

Q. If something oozed up through the nail holes the stains would come from the same barrels?

A. Not after they were plugged up.

Q. Not after they were plugged up, no, but before they were plugged up, showing that the barrels had been subject to some state of fermentation, prior? A. Yes, possibly.

Q. Who put the nail holes in those barrels?

A. Our foreman.

Q. And did you notify Mr. Baker when you put nail holes in the barrels?

A. No, we didn't notify every individual barrel, didn't think it was necessary. We were going according to his instructions about putting them in to save them from blowing up; that was a natural precaution. If you see a barrel about ready to blow up, why, follow the instructions of Mr. Baker and put a hole in it and relieve the pressure.

Q. Mr. Baker's instructions were to notify him at once, weren't they? A. Yes.

(Testimony of Wilbur P. Reid.)

Q. And you didn't see fit to follow those instructions?

A. No, I didn't notify him at all times. [309]

Q. You didn't follow Mr. Baker's instructions until after the fourth day of August, 1920, did you?

A. No.

Q. You began to follow Mr. Baker's instructions when you began to let the temperature go up, didn't you?

A. What do you mean? Up or down? Colder or warmer?

Q. I mean warm; on the fourth day of August you began to let the temperature get warmer, didn't you? A. Yes.

Q. And on the ninth day of August for the first time you wrote a letter to Mr. Baker about bad order barrels, didn't you? A. Yes.

Q. And then there was considerable notice to Mr. Baker, especially about the sixteenth or twentieth of August, when the temperature was hovering around thirty-six. At any rate Mr. Baker got down here, didn't he? A. Yes.

Q. And then was when you began to notify him, after you permitted the temperature to go to thirty-six; that is a fact, isn't it? A. Yes.

Mr. SPENCER.—That is all.

Redirect Examination.

Q. Mr. Reid, you have stated when this temperature went up; were you stating that from memory, or how? A. Yes, as I recall it.

(Testimony of Wilbur P. Reid.)

Q. I will ask you did you make a memorandum from your time-book at any time? A. Yes.

Q. Did you make that memorandum?

A. I made that myself, yes.

Q. Now, look at that and see if you have stated that from memory correctly?

Mr. SPENCER.—If anybody kept a time-book it would be very, very material.

COURT.—The man who kept the time-book.

A. The temperature?

COURT.—Yes. [310]

A. Our engineers.

Q. Now, you said something about there being sixty-five or seventy-five per cent of the berries that showed distress in some way or another—the barrels. I think you stated, too, that there were 231 barrels that were in good condition, didn't you?

A. Yes.

Q. What does that mean, that there are 231 barrels of these 398 barrels that have been in good condition all the time that are now in good condition?

A. They are in good order to ship and I believe that they are in as good shape now as they were in that time.

Q. What I want to know is whether or not any of these 231 barrels were fermenting at the time Mr. Baker was there looking at them, or do you know?

A. Well, I believe that some of them might have been.

Q. How many of them?

(Testimony of Wilbur P. Reid.)

A. Some of them might have been bubbling, and nail holes.

Q. Through the nail holes?

A. Some of these 231 have nail holes now and they were bubbling—some of them were bubbling at that time, when the temperature was thirty-six.

Mr. BOOTHE.—That is all.

JUROR.—What was the object in marking these shipping receipts “Bad order”; the receipts to the drivers?

A. Why, there was only a few receipts marked that way. They were coming in so numerous and so many, two and three on every truckload that were bad, and we put them right along together and all together into the freezer, but we didn't note on the driver's receipt or our receipt, cold-storage receipt, either form, we didn't note the condition of the barrels. We took them in just as they were, but our foreman has a record of their number, of every barrel [311] and the condition of each, showing the numbers that have blown out and leaking. We have that record, but that record was not furnished to Mr. Baker.

JUROR.—Now, the berries were received up until the nineteenth, weren't they, of August?

A. Up until about the eighteenth, I think, of August.

JUROR.—Well, the temperature in the room from the fourth—whatever came in the room from the fourth up to the eighteenth or nineteenth were not put into refrigeration at all in the warm room

(Testimony of Wilbur P. Reid.)

at thirty-six; you didn't freeze them?

A. No, not at that time, those that were put in.

JUROR.—Did you issue negotiable receipts outside of those ones to Mr. Baker?

A. Yes, we did.

JUROR.—Note in bad order or good order on them?

A. Nothing said about the condition.

JUROR.—Nothing said. So many barrels?

A. So many barrels. The barrels that he sold to other people were in our warehouse and the negotiable paper on them.

JUROR.—But they were all marked good order?

A. All were not marked good order anywhere, simply marked so many barrels in and out of storage.

JUROR.—Isn't there a custom to mark on receipts bad order to protect against loss?

A. I don't think so; it is not general, no.

JUROR.—If they came in bad order wasn't they receipted for as bad order?

A. I don't think it is general to do that. We have other commodities in there that we do not know the kind of contents or what shape it is in; it is barreled up and nailed up and we don't always have authority to open up the packages. We take them just as they are, one [312] box or one barrel. It doesn't signify, when we write out a receipt, that they are in good order.

JUROR.—All of those barrels of berries that

(Testimony of Wilbur P. Reid.)

were fermented, spoiled, were the identical berries that were delivered by Mr. Baker?

A. Yes, the barrels that went into our storage are the ones that went out, are the ones that were held—some were held over.

Q. You trace them by the numbers or date of their receipt?

A. Trace them by the numbers.

Q. These 398 barrels, now, they can be traced by date of receipt?

A. Except where they are blown out and the record on the head, where they are printed on, is destroyed, something like that.

Witness excused.

Testimony of Frank H. Pick, for Defendants.

FRANK H. PICK, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Pick, speak a little loud, so the jury can hear. There is a good deal of noise here. What is your business?

A. My business is food broker and canner.

Q. How long have you been engaged in that business? A. About five years.

Q. Have you been engaged in handling logan-berries? A. Yes, sir.

Q. How long have you handled those?

A. About three years.

(Testimony of Frank H. Pick.)

Q. Buying and selling? A. Yes, sir.

Q. Have you had frequent opportunities of examining loganberries? A. Yes, sir.

Q. Have you had opportunity of observing the handling of loganberries hauled by trucks?

A. Yes, I have.

Q. In this case, Mr. Pick, it seems that the loganberries were packed [313] in barrels, fifty gallon barrels, I believe, at Salem, and hauled by trucks from Salem to Portland, and the time consumed in hauling them down was about three and a half or four hours. What would you say as to the effect this hauling of the berries that distance in that time would have upon them?

A. Well, the hauling it from Salem to Portland, of course, all depends on the weather when they were hauling these berries from Salem to Portland. Naturally if it was hot weather it would start fermentation. If they didn't have it on too long, held at Salem when they took the berries—

Q. Supposing the berries were put in barrels and tamped down with some weight—I don't say they were mashed down, but smoothed down, leveled down with some kind of a weight, would that have any tendency to cause them to ferment quicker?

A. Yes, if they were mashed—

Mr. SPENCER.—He didn't say mashed, just smoothed down, just smoothed.

A. Smoothed down. I don't know the condition of the berry, how the berry would—crush the berry, if they were shaken down. It all depends on the

(Testimony of Frank H. Pick.)

weather; if it was hot weather naturally it worked quicker to ferment the fruit.

Q. Have you seen these barrels of loganberries in the plant of the defendant?

A. Yes, sir, I did.

Q. State to the jury what you found there?

A. Well I found part of them in good condition; I found some that the heads were swollen.

Q. About what proportion, if you remember, were in good condition?

A. Well, sir, I don't know; I just forget the figures.

COURT.—You mean the barrels in good condition?

Q. Barrels; I am not speaking of the contents—goods. You didn't examine the goods at all, did you? [314]

A. No, I didn't examine the goods.

Q. You looked at the barrels and you are testifying so far as the barrels are concerned there were a certain number that you say looked to be in good condition? A. Yes.

Q. And you say there were a certain number with the heads off?

A. They were not off, but they were bulged.

Q. You didn't examine the goods yourself, did you? A. No, I did not.

Q. Now, Mr. Pick, suppose those goods when they were received by the cold storage company were fermenting, bubbling, sizzling, how long would it take,—putting them in a freezer, say, of twenty-

(Testimony of Frank H. Pick.)

six degrees to freeze them or stop the bubblings?

A. Well, ought to stop the bubbling in about two or three days, seventy-two hours. It all depends on the temperature that you put them into.

Q. Now, if they came to the plant, the cold-storage plant, fermenting to such an extent that you could hear them ozzing or sizzling, were those berries ruined at that time?

A. Well, they were not good; they were not in a marketable condition at the time, not if they were sizzling, working, fermentation on them.

Q. Now, supposing they are frozen, are they still marketable goods?

A. No, I don't think so, because after you took them out, why, the fermentation comes right back.

Q. Then if they are fermented before they are put in the cold storage you would say that they are not then marketable at all?

A. No, not if they were fermenting already; naturally nobody would want fermented berries.

Q. And suppose, now, Mr. Pick, that those loganberries, a part of them, at least, were in this fermenting condition when they were put into the cold-storage plant, frozen, and some two or three weeks after that the temperature should go up gradually to, say, for a day at thirty-six, and they should begin to ferment and sizzle again, [315] are they damaged any worse than they were in the first place? A. No.

Q. If they were damaged at all, then, you would say that the damage was the first fermentation?

(Testimony of Frank H. Pick.)

A. Absolutely.

Q. Have you had any experience with fermented goods of this kind?

A. Well, I did some, not very much; never have any experience, that is, to have berries go bad on me. I have had some, not from my own.

Q. What did you do with them when they got into that condition?

A. Well, we had to re-process them and sell them to preserve people for preserves.

Q. Did you get as good a price as—

A. No, because they are re-processed.

Q. They have a little value?

A. They have a little value, yes, but not the value they had when they were put in the barrel fresh.

Q. How did you re-process them?

A. By adding sugar; I should imagine that the berry, after you take them out to re-process them, you mash the berries.

Q. From your observation of the berries you saw in this plant, do you think they are totally destroyed?

A. No, I don't think they are totally destroyed.

Q. Do you know what loganberries were worth during the summer of 1920 in barrels.

A. Well, that I just could not say, what they were worth at that time.

Q. Was there any market here for them at that time?

A. Well, there was and there wasn't. I would

(Testimony of Frank H. Pick.)

not say that there was a very big market for them, no.

Mr. BOOTHE.—I think that is all.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Pick, your experience has been that of a canner? A. Partly, yes, sir. [316]

Q. Have you packed loganberries?

A. Yes, sir.

Q. Where? A. Carver, Oregon.

Q. You have a packing plant there? A. Yes.

Q. How much packing have you done there?

A. Well, we haven't very much; packed last year, we have some packed last year and I had experience with the Standard Fruit Products, at Second and Alder.

Q. Last year was your first? A. Yes.

Q. And how many berries did you pack at Carver last year?

A. We didn't pack very many last year.

Q. How many?

A. We packed—oh, maybe a thousand or fifteen hundred cases of loganberries.

Q. A thousand or fifteen cases of loganberries; how many barrels would that be?

A. That is sixty pounds, be about sixty thousand pounds, would be about three hundred and fifty or four hundred pounds to the barrel.

Q. Be about a carload, wouldn't it?

A. Yes, just about.

(Testimony of Frank H. Pick.)

Q. And you are figuring on packing this year?

A. Yes, sir, packing right now.

Q. You pack at Carver? A. Yes, sir.

Q. Where is Carver?

A. Carver is just the other side of Clackamas, about sixteen miles from here.

Q. Now, counsel has asked you about the effect on these berries if they went into cold storage after being packed, if they went into cold storage in a fermenting condition, sizzling and bursting. Suppose they went into cold storage all right?

A. Yes.

Q. And they were subjected for a period of four or five, possibly six days of temperature above freezing, would that have any effect on them? [317]

A. You mean when they were put in in good condition?

Q. Suppose they were put in in good condition.

A. Well, if you put them in in good condition, if you run a temperature, naturally it will start your berries fermenting.

Q. And if the warm temperature happened to them after they were put in cold storage the same depreciation in value would occur just as you have testified might occur, if they were good in the first place?

A. If they were already fermenting the freezing would not do them much good.

Q. I am assuming they were not frozen. In the first place, suppose they were put in all right.

(Testimony of Frank H. Pick.)

A. I don't know whether they were put in all right.

Q. I am asking you to assume. You don't know whether they were all in bad condition, either.

A. No, only just what I have heard about it.

Q. Suppose you heard something else about it. Suppose you heard they were put in in good condition, suppose everybody who had anything to do with the handling, from the fellows who packed them, who brought them in in trucks, had the responsibility to look after them, all state as far as they were observed they went in in good condition, and, barring a few barrels, they were in good condition; and then a rise in temperature happened because the storage people let off—

A. A barrel might be working and you don't know anything about it.

Q. The working of the barrel of loganberries might be caused by some act of the cold-storage people. A. I don't know about that.

COURT.—He means after they were put in cold storage they take the frost off and let the temperature go to thirty-six and stay there.

A. That depends on how many days they leave it go at thirty-six. [318]

Q. You don't mean to let us understand that there is not anything the cold-storage people could do that would hurt the berries?

A. No, I don't think they want to hurt the berries, because you could keep your berries at thirty-six and they will keep.

(Testimony of Frank H. Pick.)

Q. It is not offered that anybody else wants to hurt the berries, either; the thing I am getting at, you are satisfied if the cold-storage people permit the berries to go into a warm room and stay four or five days, or a week, it is bound to result in the deterioration of those loganberries, provided they went in there all right.

A. I don't know what condition they went in.

Q. I am saying, assuming they went into—

A. —the packing-house all right.

Q. You have answered a question assuming they went in all wrong. Now, can you answer my question, assuming they were all right?

A. Assuming they were all wrong, they were all wrong.

Q. Assuming they were all right when they went in, they should come out all right. A. Yes.

Q. And if anything happened in the meantime about the only conclusion is that it happened through some act of the cold-storage people, is that right? A. Well, maybe so.

Mr. SPENCER.—That is all.

Redirect Examination.

Q. Now, suppose, then, the berries went in there in good condition, all right, and they were put in the freezer, twenty-six degrees, frozen, twenty-six degrees, kept there for some little time, say two weeks, something like that, and then suppose the temperature should gradually come up to as high as thirty-six degrees, running over a period, say, a week or ten days, should those berries under

(Testimony of Frank H. Pick.)

those conditions begin to ferment?

A. No, sometimes it takes a week or ten days before they start to melt.

Q. What?

A. It takes a week or ten days before they start to melt. It all [319] depends on the condition they are in before the hot temperature came in there. Frozen barrels of fruit, it takes a week, some time to melt, before it starts.

Q. And it would not hurt the berries, then, if they had a temperature—

Mr. SPENCER.—Suppose you let him testify.

Mr. BOOTHE.—I think he said it; I just want to repeat it, that is all.

Recross-examination.

Q. Mr. Pick, did you ever have any packed berries in cold storage?

A. Did I have any?

Q. Yes, other than the carload you had last year.

A. No, I have been selling the packed berries.

Q. Well, have you had experience in operating a cold-storage plant?

A. Why, no, I didn't have experience in operating a cold-storage plant; no.

Q. And your selling of loganberries, packed loganberries, has been over a period of how many years?

A. Been there for five years.

Mr. SPENCER.—I think that is all.

JUROR.—You said the bubbling of the barrels—now, is the bubbling of the barrel when they are

(Testimony of Frank H. Pick.)

rolled and handled, does that prove that fermentation has set in? If there wasn't any fermentation and a leak in the barrel, wouldn't they bubble?

A. Sometimes they would and sometimes they would not. If it is bad fermentation naturally you could hear the sizzling. A barrel might be fermenting right in the center of the barrel, you don't know anything about it. It might be all right to send it through, get at the other end, the destination, blow out.

JUROR.—What I was getting at, handling the berries, rolling them, if there was a leak wouldn't it bubble out through, the juice bubble?

A. Yes.

JUROR.—That is no sign it is fermenting?
[320]

A. No, because they may not tip the barrels, get the heads down in order to get in the stuff. When they take the heads out the juice may come out.

JUROR.—What I want to know is, can you tell whether there was fermentation or not?

A. No, you could not tell.

Witness excused.

Testimony of E. L. Patton, for Defendants.

E. L. PATTON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Patton, what is your business?

(Testimony of E. L. Patton.)

A. Foreman, National Cold Storage.

Q. You will have to speak a little louder; it is quite noisy.

A. Foreman, National Cold Storage.

Q. How long have you been their foreman?

A. About eight years.

Q. And you were their foreman during the season of 1920, were you? A. Yes, sir.

Q. Did you have anything to do with the receiving of those goods that were sent in by Baker to this cold-storage plant? A. A part of them.

Q. What did you have to do with them?

A. I had to make out the storage receipt; get the number of the barrels and examine them.

Q. Did you receive any of the goods that were brought in by the truckmen?

A. Part of them, yes, sir.

Q. Do you recall or have any memory just now as to how many barrels you received?

A. I could not tell you exact; I suppose about one-third of them.

Q. Probably one-third? A. Yes, sir.

Q. Your hours of the day were from when to when? [321]

A. From six in the morning until six in the evening.

Q. And then those goods that you received were received during the daytime not later than six o'clock in the evening?

A. Yes, in the daytime.

Q. Now, you may state to the jury the condition

(Testimony of E. L. Patton.)

those barrels were in when you received them.

A. A part of them were all right; others were sizzling and showed some distress, but we tried to save every barrel that we could, even if they did show a little distress.

Q. When you received them what did you do with them?

A. We put them in our cold-room as quick as we possibly could, as soon as we could roll them down there.

Q. To what extent can you say the barrels were fermenting? A. I could not say.

Q. You could not say? A. No, sir.

Q. Could you hear them?

A. You could hear them once in a while; yes, sir.

Q. Did any of them blow up.

A. Quite often had some to blow up; yes, sir.

Q. Did any of them blow up during the daytime when you were there? A. Yes, sir.

Q. Do you remember how many blew up?

A. No, I could not; I could not tell you.

Q. What did you do when they blew up?

A. Why, they blowed their heads out.

Q. Did it blow the berries out? A. Yes, sir.

COURT.—He is asking about the condition before they went into the cold-storage room, or after that? A. Before and after also. [322]

COURT.—He is asking about the condition before. A. Before?

Q. This is before, I am referring to now.

(Testimony of E. L. Patton.)

A. Yes, sir.

Q. Did you see any of them blow up before they went into the cold-storage room? A. Yes, sir.

Q. Do you remember about how many blew up?

A. I could not tell you. Almost every—that is, the latter part of the season get one or two a day.

COURT.—One or two a day? A. Yes, sir.

Q. Did you know anything about any blowing up on the track near the warehouse?

A. Only hearsay.

Q. You didn't see that?

A. No, sir, not until afterwards. I didn't see it blow up, no, sir.

Q. Did you see it after it had blown up?

A. I saw the effects of it; yes, sir.

Q. What did you see?

A. I saw loganberries lying on the street.

Q. Do you know how many barrels there were?

Mr. SPENCER.—That is pretty remote.

COURT.—Of course you would have to show that they were logan berries coming in from Baker; you would have to follow that up.

Q. Do you know what loganberries those were?

A. They were in the same load coming in from Mr. Baker.

Q. And was the balance of the load unloaded at your place? A. Yes.

Q. Do you know how many barrels there were that blew up there before they came to the plant?

A. The driver told me there was one barrel blowed up.

(Testimony of E. L. Patton.)

Q. And you saw it lying on the ground?

A. Saw the contents of the barrel, yes, sir.

Q. Did you notice or observe whether or not any of those barrels you received had nail holes driven in them before they got to the plant?

A. None, no, sir.

Q. Now, when those barrels were received by you, how long before they were put into the cold storage or freezing-room? [323]

A. They were put into the cold room just as soon as we could check them off and roll them down into the basement.

Q. Then that would be immediately, would it?

A. Yes, sir.

Q. They were not allowed to lay around there, were they? A. No.

COURT.—How long does that take, Mr. Patton?

A. According to how many barrels that came in.

COURT.—Of course.

A. But ordinarily it would be not more than an hour.

Q. If two or three barrels, then, came in at one time it would only be a few minutes until they were down in the cold room?

A. Only be a few minutes until they were down in the basement, yes.

Q. Were those barrels numbered?

A. Yes, sir.

Q. In consecutive order? A. Yes, sir.

(Testimony of E. L. Patton.)

Q. Did they come in to your place in the same consecutive order? A. Not always.

Q. What did you observe about that?

A. I have my memorandum here of that. If a load was delayed any I could easily tell by the numbers of the barrels that came in, as they ought to come in by rotation.

Q. Have you any reference on that subject that you can look at in your book that tells about it?

A. Yes, sir.

Q. What is it; just turn to your book.

A. I have one instance here where there were two barrels delayed in coming in; should have come in on the eighteenth and they didn't come in until the nineteenth. I also—

Q. How do you know they should have come in on the eighteenth? A. By the numbers.

Q. As compared with the others that were coming in?

A. As compared with the others that were coming in at that time, yes, sir. Each barrel is numbered and I would copy down the numbers from the barrels and when a barrel didn't come in on time, why, I made a [324] notation of it. Also there was on the twenty-first—

Mr. SPENCER.—What was the—

A. On the twenty-first there should have been ten barrels; eight barrels came in on the twenty-first.

Q. How many?

A. Eight. They were delayed one day, came in

(Testimony of E. L. Patton.)

on the twenty-second. And every once in awhile there would be a barrel delayed in coming in, would not come in until the next day.

Q. Does that book you have there show the number of each barrel that came into the plant for Baker? A. Yes, sir.

JUROR.—Were those barrels marked in bad order, those delayed barrels?

A. No, they were not marked in bad order, but we could not tell exactly whether in bad order or not unless the head was splintered, or something of that sort.

JUROR.—Was the head split?

A. The ones that were delayed?

JUROR.—Yes.

A. No, sir, not that I know of, but they might have been fermenting, but then I could not tell you whether they were or not or whether any of those that were delayed were fermenting.

JUROR.—Was that July or August delivery.

A. Well, there was part of them in July and part of them in August.

Q. Now, the goods were delivered there at night-time, part of them, were they? A. Yes, sir.

Q. Who received them then?

A. The night man, Mr. Horne, I believe.

Q. What notation did you make about those goods and what did you do regarding them?

A. I would take the number; he would roll the barrels in the basement that night, as soon as he

(Testimony of E. L. Patton.)

received them: I would take the numbers [325] the next day of the barrels.

Q. He would report to you what he had received the evening before, would he? A. Yes, sir.

Q. Have you examined those barrels at different times since they were put in there?

A. Yes, sir.

Q. Can you state to the jury what the condition of those goods is, so far as outward appearance is concerned, at the present time?

A. The part of the barrels are in good condition; that is the outward appearance of them.

Q. About how many—have you counted them and made a memorandum of it?

A. Yes, sir, I have 231 barrels are in good condition. 231 barrels are in good condition, 143 barrels in what I call number two's, their heads are splintered, which is on account of the freezing of the barrel, or contents of the barrel; the barrel was too full and of course in freezing the contents will expand and that pushes the head or splinters the head; it has to have room in there to expand, in the freezing. I have also 24 barrels the heads are blown out.

Q. What about the balance of them, or have you related all that I—you said 231—

A. 231 are in good condition, 143 the heads are splintered on account of the freezing and there is 24 heads are blown out.

Q. Did you have any conversation with Mr. Van Doren about the filling of the barrels?

(Testimony of E. L. Patton.)

A. Yes, sir.

Q. What did he say in regard to the filling of the barrels?

A. I told him he was filling his barrels too full, or I thought he was filling his barrels too full; he didn't give enough space there for air or space for freezing. He says, "Yes, I knew that," he says, "I have got to be right there all the time to tell those fellows not to fill the barrels so full," he says, "I can't be there all the time to watch them."
[326]

Q. Did you see these goods about the time Mr. Baker was there, say about August—

COURT.—Twentieth—about the twentieth.

Q. —about August twentieth?

A. I was down there every few days; every day or two.

“Q. Were you there at the time Mr. Baker was in there on August twentieth?

A. I expect I was some place around the building.

Q. Do you remember the time that he was there? A. No, I do not.

Q. Did you observe the condition of the goods along about August 20th?

A. I could not tell you on what date it was.

Q. Did you notice some fermenting at any time along in the early part of August or up to the middle of August, the twentieth of August?

A. Yes, sir, they were fermenting some. We drove nail holes in the barrels, each barrel that

(Testimony of E. L. Patton.)

came in, to take the pressure off the barrels.

Q. Each barrel as they came in?

A. Yes, as they came in.

Q. Now, state what portion of these goods you have covered here were fermenting at that time?

A. I could not tell you. I could not tell you what were fermenting which barrel. The gas forms in the barrel.

Q. Were any of those 231 fermenting?

A. No, sir.

Q. It was the 143 that you have spoken of there were the ones that were fermenting along in this time, in August?

A. There was something like that, yes, sir.

Q. Something like that? A. Yes.

Q. Did you take any barrel or barrels out of there and put them in another temperature to test it out, to see whether they would ferment?

A. No.

Q. I will put that question another way. Maybe you will understand it. Were there any barrels re-processed? A. Yes, sir. [327]

Q. How many? A. There were two.

Q. Who did that?

A. I can't think of the gentleman's name.

Q. Mr. Loy? A. Mr. Loy I think it was, yes.

Q. Did you get the barrels out of the store-room? A. Yes, sir.

Q. What kind of barrels did you get?

A. I selected two barrels, I selected one of the

(Testimony of E. L. Patton.)

number ones and one of them that had the head blown out.

Q. Where did you put those barrels?

A. Took them upstairs and let them thaw out and he re-processed them and we put them back down into the basement again.

Q. When you put them upstairs to let them thaw out what degree of temperature did you have on them?

A. They were about—I don't know what the temperature was outside; it was out in the hall.

Q. What time of the year was it?

A. I should judge it was about two or three months ago.

Q. Well, it was as warm as thirty-six, was it?

A. Oh, yes.

Q. How long before they thawed out?

A. It took them, I think it was somewhere about a week.

Q. Did they ferment? A. No, sir.

Q. Well, where are those goods now?

A. They are in the basement.

Q. Did you see them re-processed?

A. Yes, sir.

Q. What was done to them?

A. There was sugar added to them.

Q. How much sugar?

A. I could not tell you that.

Q. Was the sugar added to the good one or the bad one? A. Both of them.

(Testimony of E. L. Patton.)

Q. What was the condition of them after they were re-processed?

A. They seemed to be in good condition.

COURT.—Any difference in them? Any difference between the good and bad, after they were re-processed? A. Very little. [328]

Q. Did you taste them? A. Yes, sir.

Q. Could you tell any difference in the taste?

A. I could not tell any difference in the taste.

Q. How about the color?

A. The color is practically the same.

Q. Were you present when Mr. Baker with Mr. Huntley went down into the basement, into the storeroom, to get some samples?

A. Well, I was at one time; I don't know who the other gentleman was. I know who Mr. Baker was.

Q. How is that?

A. I don't know who the other gentleman was; I know Mr. Baker.

Q. There was some gentleman with Mr. Baker.

A. Yes, sir.

Q. How many samples of it were taken?

A. They took out of two barrels.

Q. What kind of barrels were they that they took them out of?

A. We opened up one barrel; took it out of the best.

Q. Took it out of the best? A. Yes.

Q. Did you take any out of the other?

(Testimony of E. L. Patton.)

A. I am not certain; I think he took one out of one with a broken head.

Q. Broken head? A. Yes, sir.

Q. Is that the only time he came there to get samples?

A. I believe he was there once before or once afterwards; I don't remember which it was.

Q. You don't remember which it was?

A. No.

Q. Was anybody with him?

A. I think there was.

Q. Was it the same person?

A. I could not tell you that.

Q. Do you know how many samples he took that time?

A. He took, I think he took the sample out of one barrel.

Q. Do you know what kind of a barrel it was?

A. No, I don't remember.

Q. Did he tell you what he was going to do with it? [329]

A. No, sir, only he wanted it as a sample.

Q. Have you any record there, Mr. Patton, of the barrels that blew up?

A. Yes, sir, I have a record of part of them.

Q. Can you state how many there are from looking at that record?

A. It would take some little time.

Q. Or from memory, if you know; if you have checked it over; do you know? A. I don't know.

COURT.—Are you referring to barrels that

(Testimony of E. L. Patton.)

blew up before they went into the basement or afterward.

Q. Yes, before they went into cold storage is the time I am speaking of. Just give the number of barrels and the date and how many barrels there were on each day, before they were put into the cold storage.

A. On the thirteenth of August barrels No. 605, 606, 608, 609; that was on the thirteenth of August. On the seventh of August barrels 561, 572, 579, 580, 582, 584. On the eleventh 588.

COURT.—Just give the date. A. August 7.

COURT.—Are you still talking of the eleventh?

A. No, part of that is on the seventh.

COURT.—Give me the one on the seventh.

A. Barrel 572.

Mr. SPENCER.—Do I understand that is a record of the barrels that had blown up before they went into the cold storage? A. Yes, sir.

COURT.—That is what he is testifying.

Mr. SPENCER.—This is the seventh of August?

A. Seventh of August, yes, sir; 561, 566, 567, 572; those are on the seventh.

Mr. SPENCER.—Those others are marked out, then, that you gave us a while ago? A. No, sir.

Mr. SPENCER.—Let us get this straight.

A. Maybe I am reading them backwards, here, so you don't get the dates of them. [330]

Mr. SPENCER.—Do I understand on the seventh 572, 579, 580, 582?

A. That was on the ninth.

(Testimony of E. L. Patton.)

Mr. SPENCER.—You read that a while ago on the seventh. A. That was on the ninth.

COURT.—What on the ninth?

A. On the ninth there was 579, 580, 582, 584; that was on the ninth. On the eleventh 588, 589, 591. And on the twelfth is 600.

COURT.—What was done with these barrels that blew up?

A. They were put down in the basement.

Q. What do you mean by blowing up?

A. Blew the heads out of them and part of the contents were lost. Tried to save what we could out of the contents of each barrel.

COURT.—Didn't you issue all the warehouse receipts, storage receipts?

A. Storage receipts, yes.

COURT.—You issued the storage receipts on the barrels?

A. Not on the ones that blowed; I had to leave these blank here.

COURT.—What?

A. I say, I had to leave those out.

COURT.—Didn't receipt for them at all?

A. No, sir.

COURT.—Mr. Baker never got a receipt for those?

A. On part of them, what we could save of them.

COURT.—Did you note on the receipts what you have saved? That is what I am trying to get at.

(Testimony of E. L. Patton.)

A. No, sir. I had this just for a record, is all.

Q. Is that all the record you have?

A. No, there is quite a bit of it.

COURT.—There has been introduced in evidence first the receipts that were given to the truckmen by the party who received these goods.

A. Yes, sir.

COURT.—And then there has also been introduced in evidence [331] a subsequent receipt by you, as I understand it.

A. Yes, sir, my storage receipt.

COURT.—Storage receipt; what I want to know is, did you issue a storage receipt for those goods that blew up?

A. No, I could not, only the ones we could save.

COURT.—So these are not charged, Mr. Baker was not charged with these in your accounts?

A. Not in this book, no, sir.

COURT.—Was he in the receipts?

A. Not in the receipts.

COURT.—So then these that blew up are not part of the goods Mr. Baker stored?

A. That is what we could save of them.

COURT.—Well, did you issue any receipt to him?

A. Yes, sir, on what we could save, yes, sir.

COURT.—Is that shown on the receipt?

A. Not where they have blown, because I put it on this book.

COURT.—When you issued the receipt to him for the goods did you note on the receipt?

(Testimony of E. L. Patton.)

A. No, sir.

JUROR.—You issued a receipt for the goods that he didn't have, there, that were spilled out on the floor, according to all these receipts. Did you deduct that number of barrels?

A. For the number of barrels?

JUROR.—You deducted the number of barrels that were not good when you issued the receipts?

A. Those that were a total loss we did, yes, sir.

Q. (By Mr. BOOTHE.) Is that all of those you have noted there, that blew up?

A. No, sir. On the seventh, again—

COURT.—You gave that.

A. Did I give you 561?

COURT.—Yes.

A. On the fifth barrel 548. [332]

Mr. SPENCER.—What is the reason we can't have those in consecutive order?

A. I started at the back.

Mr. SPENCER.—Been jumping around.

A. On the first—

COURT.—Only one on the fifth?

A. One on the fifth, yes.

Mr. SPENCER.—First of what, Mr. Patton?

A. First of August. Barrels 431 and 432. On the second of August there was barrel 449; on the first again there is barrel 414 and 417.

COURT.—Why didn't you give that before, when you were giving the first?

A. Part of it is on the other page.

COURT.—I see. Now give me those.

(Testimony of E. L. Patton.)

A. On the first?

COURT.—Yes.

A. Well, there is barrel 414 and barrel 417; you have got those on the first?

COURT.—Yes, I have got two on the first.

A. Then on the 28th of July barrel 261, barrel 246—

Mr. BOOTHE.—What number?

A. 246; there is barrel 265, that also was on the 28th. On the 26th barrel 210, barrel 193. I believe that was all of the barrels that were reported that had heads blown out.

JUROR.—Were those heads blown out or in bad order? A. Heads blown out.

Q. I figure that up to number twenty-eight; is that about right?

A. Something like that; yes, sir.

Q. Something like that; that is what your memory serves you? A. Yes.

COURT.—Do you know how many barrels in all were delivered by Mr. Baker?

A. Altogether?

COURT.—Yes.

A. I have the record here. A thousand barrels in the first lot and 630 of another lot. [333]

COURT.—What do you mean by lots?

A. Well, he numbered them up to one thousand and then went down and then he commenced at one again and numbered them over again.

COURT.—That makes 1,630?

A. Something; I forget just how many.

(Testimony of E. L. Patton.)

COURT.—While this matter is yet fresh in my mind, just to get one or two matters cleared up, did you, when these barrels came in and the heads blew out, did you make a memorandum in this book at that time? A. I did, yes, sir.

COURT.—At the time? At the time it was done? A. I put it on the date.

COURT.—On the date you invoiced them you made that memorandum? A. Yes, sir.

Q. I notice here on August thirteenth that you give 605, 606, 608 and 609 as blown out, and there isn't any memorandum in the book about it; how do you account for that?

A. You mean the memorandum here?

Q. Nothing about that. A. Those here?

Q. Yes.

A. Why, we could not get the number of barrels.

Q. I notice you don't mark those.

A. It was so that I could not get the number or could not get the weights on there.

Q. I see on this page, you will notice, you entered after these numbers the word "Blown," "Blown." A. Yes, sir.

Q. Now, does that mean that those were not credited to—I might say credited to Mr. Baker at all. Were they so destroyed that they were not counted?

A. The heads were blown out so that we could not get the number and [334] weights on the barrels; you see the heads were destroyed.

(Testimony of E. L. Patton.)

Q. I have not been able to understand yet about the receipts.

A. Any of those barrels, when they blowed the heads off we tried to save the contents as much as we possibly could.

Q. And then receipted for them?

A. And then receipted for part of them.

Q. That is what you said a moment ago; now I want to know what part you receipted for and what you didn't?

A. Some we could not receipt for; we have a lot of empty barrels down there now in the basement, several empty barrels down in the basement didn't give a receipt for.

Q. How many of them? A. I don't know.

Q. Now, in issuing the receipts for a barrel that was blown out, the head of it, did you note that fact on the receipt? A. No, sir.

Q. That it was in a damaged condition?

A. No, if I give the receipt for the number of barrels received.

Q. Yes, but you were receipting to the owner, too? A. Yes, sir.

Q. And you didn't note on the receipt—

JUROR.—For instance, if a barrel was blown up when you issued the receipt.

A. Some were blown up after the receipt had been issued.

JUROR.—Did you put a notation on the receipt and note the number of the barrel so you had an account of it?

(Testimony of E. L. Patton.)

A. After we received the barrel, some of them, their heads were blown out.

COURT.—I thought this record was the record you made at the time you received them?

A. At the time I received them, yes, sir.

COURT.—So this record only shows the ones the heads were blown out at the time you received them. A. At the time we received them. [335]

JUROR.—Do I understand the contents of these barrels, some, were entirely lost?

A. Some were entirely lost.

JUROR.—I can't understand how you accounted for the number of barrels lost to Mr. Baker, if there was no record.

A. The numbers on the barrels would show that the barrels were a total loss.

JUROR.—When you made a receipt, if there was a number missing in that list of barrels Mr. Baker understood that barrel had blown out?

A. I don't know how they made up the receipts in the office; I made out my receipts and turned it into the office.

JUROR.—I was trying to get at how you made the account for the barrels blown out.

COURT.—That is what I am trying to have him clear up.

A. I would put down what barrels were received in practically good order, that is all that we could save at the time; but part of the barrels blown up afterwards in the basement we could not save—

(Testimony of E. L. Patton.)

that is we could save part of the contents, but not save all of them.

Q. A barrel blown up after you had given the receipt for that? A. Yes.

COURT.—That would not have anything to do with your record here, would it?

A. The one that blowed up in the basement?

COURT.—Yes. A. No, sir.

JUROR.—In other words, those that were absolutely worthless you made no record of.

A. No.

JUROR.—That is the idea. And those in partial bad order?

A. These I made a record on this books of the ones blown up before received.

COURT.—You didn't issue a receipt, no receipt was issued [336] to Mr. Baker for them?

A. That is the ones that were a total loss when received, no, sir.

JUROR.—That is the idea.

Q. Do you remember that shipment of berries to John Sexton & Company?

A. I don't know; I don't remember that particular car, no, sir, or any particular shipment.

Q. ASD 895?

A. I don't remember the car; I know we were making quite a number of shipments at that time; they would be two or three cars a day.

Q. I will ask it this way; in the shipment of these goods, two cars from Mr. Baker, I would say, before they went out— A. Yes, sir.

(Testimony of E. L. Patton.)

Q. What condition did they go out, so far as the barrels were concerned?

A. The barrels seemed apparently in good order; any barrels that were—that didn't show good order I would put them back in the basement again.

Q. Were they cleaned up? Were the barrels cleaned up before they were put into the cars?

A. Part of them were cleaned, yes, sir; that is if they needed it bad.

Q. Was there anybody there to represent Mr. Baker, see that the goods were all right when they were shipped? A. No, sir.

Q. Was Mr. Van Doren there?

A. Yes, sir, was there part of the time, yes, sir.

Q. He was there?

A. I believe Mr. Van Doren was there when we were loading one or two cars.

Q. Did he approve of the condition of the goods as they went out?

A. He didn't disapprove of it.

Q. And that is true, is it, as regards all of the goods you shipped out?

Mr. SPENCER.—No, he just said it was not true; he said he was there once or twice when it was shipped out.

Mr. BOOTHE.—Just strike that question. [337]

Q. In regard to all the goods that were shipped, were they sent out in good condition, so far as outward appearances are concerned? A. Yes, sir.

Q. And were they all frozen?

A. They were in good condition, yes, sir.

(Testimony of E. L. Patton.)

COURT.—I asked you just before recess if you could give me the number of barrels that were brought there for Mr. Baker, the total number; you gave me two lots, one a thousand and one 630?

A. Then there was one lot of 530.

COURT.—530 and 630?

A. 530. No, hold on, that is strawberries. Wait a minute. There were a lot of loganberries, what they call beach; they were prepared, I believe they said, they were part sugar in them. I forget now just how many barrels there was. I have a record of it here some place.

COURT.—I don't care about that. I only want those that went in cold storage.

A. They went in cold storage.

COURT.—They don't count in this case.

A. No.

COURT.—Mr. Reid testified there was 1720 barrels received; what is your record?

A. Well, this record shows here one lot of a thousand and the other lot here of 630; that was the second lot that came in.

COURT.—Any others?

A. Well, except those beaches.

Q. What is that?

A. Yes, sir, that is all that shows in here; might be more than that.

JUROR.—How were they segregated in two lots that way, when they were shipped in every day? How do you make the segregation in two lots?

A. We put a lot number on each barrel and in

(Testimony of E. L. Patton.)

shipping them out we shipped them out as when started in, at number one, and shipped them [338] out as near as we could, one hundred barrels or one hundred and two barrels to the car, and that next number, whatever we left, that was shipped on and continued down the line in the numbers?

COURT.—Does counsel know how many barrels were receipted for?

Mr. SPENCER.—1630 is our notion; if we had any other number we would like to know.

COURT.—There were some Beechnut ones, did they make the 1720?

A. There was some what they call beach, prepared berry.

Q. That is about how many?

Mr. SPENCER.—1630 is all we have.

Q. Then these beach made up the balance?

A. Yes, I think it is the beach berries.

Mr. BOOTHE.—That is all I want to ask this witness, but I would like, if it would be satisfactory with counsel and the Court, to wait with the cross-examination of Mr. Patton until I could call another witness who works at night and wants to get away.

Mr. SPENCER.—That is all right with me.

Witness temporarily excused.

Testimony of William Horne, for Defendants.

WILLIAM HORNE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of William Horne.)

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Horne, what was your business in the summer of 1920?

A. I worked for the National Cold Storage and Ice Company.

Q. What were you doing?

A. Night foreman there, taking care of the warehouse.

Q. Did you have anything to do with the receiving of those goods brought by truck for H. A. Baker?

A. Yes, sir. [339]

Q. When they came at night did you receive them? A. Yes, sir.

Q. I presume you could not tell how many you received, could you?

A. No, I guess I received the most of them.

Q. Most of them at night? A. Yes, sir.

Q. What was the condition of those goods, so far as you could tell from outward appearance when they came in there?

A. Well, there was some good and some bad and some the heads blowed up, you know.

Q. Well, how many would you say had the heads blown up?

A. Well, some would be one on a truck, you know, blowed all over the truck. I had to get a truck and truck it in, and some you could see them sizzling.

Q. Do you know about how many were sizzling?

A. Well, I could not very well tell on the truck, you know, until I get them rolling in the gangway.

(Testimony of William Horne.)

You see as soon as I turned them over and roll them the stuff kind of fermented and you could see it.

Q. After they were setting a little while, then, did they begin to ferment?

A. No, they were standing up on the truck, you see, then they would turn them over and I would roll them up to the elevator and then you could hear them sizzling, squirting out on the side. Some. Some would not.

Q. Did you see any barrel blowed up?

A. Yes, sir; one blew up right beside of me. The head just blew right up. I was standing like this, and bing, she went over me. I was berries from head to foot, loganberries.

Q. Was the truckman present then when you did that? A. Yes, sir; he laughed.

Q. Did any of those barrels have nail holes or vent holes in them [340] when they were brought there by the truckmen?

A. Yes, sir, they done that to keep them from blowing up on the road, towards the last, to give them air.

Q. How do you know that?

A. Well, when you tip a barrel over and start to roll it, she started sizzling out of the little hole, you see, a little hole, s-s-s-s-s-s, and I asked the driver.

Q. Did the truckman say anything about putting those holes in? A. Yes.

Mr. SPENCER.—The truckmen were not confronted with this testimony; they were here.

Mr. BOOTHE.—All right, then.

(Testimony of William Horne.)

Q. How many barrels did you find that had holes in them?

A. Oh, I didn't say, I didn't keep track of them; I didn't pay attention that close.

Q. How is that?

A. I could not say that, how many.

Q. Well, were there several?

A. Oh, there were several, yes.

Q. Now, when those barrels were unloaded, how long did you leave them lying there before you put them down in the freezer?

A. As soon as I got them off the truck I put them down in the basement.

Q. How long would that be before you would get a truckload down into the freezer?

A. Oh, I guess about an hour; less than an hour; just had about twenty barrels to get down, maybe eighteen. I took four at a time in the elevator and rolled them right in.

COURT.—That is in the cold-storage room?

A. That is in the big basement; I only had to drop them right down.

Q. Was there any time you allowed those barrels to lie there in the road until another truckman should come along?

A. No, sir. I was ordered to put them down as soon as I got them.

Q. Were you always present there, responded promptly, when they came in? A. Yes, sir. [341]

Q. That is quite a large plant there, isn't it?

A. Yes, sir.

(Testimony of William Horne.)

Q. Covers a whole block, does it not?

A. Yes, sir.

Q. And your duties were all over the whole plant?

A. Yes, sir, I get pretty near over the whole plant.

Q. On top of the cars and everywhere?

A. Yes, sir.

Q. No trouble to find you at any time, was there?

A. No, no trouble.

Q. When the barrels of berries, then, were put down in the cold-storage place your duties were done in regard to them?

A. Yes, sir; I reported to the day foreman how many was blowed and what the temperature was to the berries.

Q. You reported to Mr. Patton?

A. Yes, he relieves me and I relieve him.

Q. Did you sign receipts for them when you took them in? A. Yes, sir, I signed receipts.

Q. Receipted for so many barrels each day?

A. Yes, sir.

Mr. BOOTHE.—That is all.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Horne, in giving those receipts to the drivers for the barrels you undertook to note on the receipts the ones that had blown out, wouldn't you?

A. No. The first one I got a load, the barrel was blown clean out and I made a note of that and the driver said, "That is the first time I ever got a broken barrel."

(Testimony of William Horne.)

Q. When was that?

A. I could not remember the load.

Q. Was it in July or August?

A. July, I think latter part of July.

Q. Did you write that down on the receipt?

A. I believe I did and I made an account of it.

Q. On the receipt? [342]

A. Yes; I said I could not sign for only so many barrels. Then I made a receipt, I think I made a note; I am not sure.

Q. And then what happened after that?

A. And after that it was just a common occurrence, took the barrels the way they came.

Q. You mean you didn't note on the receipts after that? A. No, didn't note at all after that.

Q. Didn't make a note?

A. No, bursting of a truckload is a common occurrence.

Q. Suppose it should appear from the receipts that there are no notations at all in July?

A. July?

Q. There is quite a bunch of them here and suppose that it should appear that there are no bad order receipts at all in July on any receipts that you gave, why, then, you would be mistaken about having noted anything on the receipt in July?

A. Might not be in July; might be in August.

Q. I understood you to say that you didn't note any after that. Just one time you remember noting and then you quit after that. That is all.

(Testimony of William Horne.)

A. That is all I remember. It was a common occurrence.

Q. I just want you to give us what is the fact about it. A. Yes.

Q. Did you note—after this first occurrence, did you note on the receipts or did you not? Was it your practice to note on the receipts bad order barrels? A. I don't think, after that one.

Q. Well, starting in on these receipts, Mr. Horne, and taking the last one first, easiest to handle, here is a receipt dated the 12th day of August, and it says on it "2 broken." What does that mean?

A. That is a head broken.

Q. Is that your writing? A. Yes, sir.

Q. Signed W. Horne? A. Yes, sir.

Q. That is on the 12th of August? [343]

A. Yes, sir, in August. I don't believe I signed any more than that.

Q. Now, here is one on the 10th of August. Says "2 barrels broken." "2 bbl. broke." Is that all your writing, W. Horne? A. Yes, sir.

COURT.—What is the date of that, Mr. Spencer?

Mr. SPENCER.—Tenth of August; August tenth.

Q. And here is one on the 8th of August, 3 barrels broken?

A. It is 3 barrels broken. Yes, sir, that is my signature.

Q. Eighth of August; and then here is one on the seventh of August, says "1 barrel bad order."

A. Yes, that is mine.

(Testimony of William Horne.)

Q. So that you did have a practice there of noting when the barrels came in?

A. Yes, I did, but it came in too heavy so that I could not keep track of them.

Q. What was the idea of noting these four or five times and not noting the rest of the times?

A. Well, it was just like a common occurrence, every day, every night.

Q. Would you undertake to tell us now how many barrels did come in in bad order that you didn't note on the receipts? A. How many?

Q. Yes. A. No, I didn't pay much attention.

Q. I think there is about eight noted on the receipts. A. Well, there is more than that.

Q. Would you undertake to say that there was more came in without heads? A. Oh, yes.

Q. How many?

A. Oh, sometimes there are two or three on the truck that have blowed up on the road, you see.

Q. You would not note that on the receipts at all?

A. No, just a common occurrence after that.

Q. Did you note that one on the receipt that blew up and blew the berries all over you? [344]

A. I don't know if I did or not; I could not swear to that, either.

Q. Now, Mr. Horne, I understood you to say that all of these berries that were shipped out by refrigerator-car went out in first-class condition?

A. No, sir, not me.

COURT.—You are speaking about Mr. Patton.

(Testimony of William Horne.)

Mr. SPENCER.—I beg your pardon. I have another man to cross-examine here.

Q. You didn't testify about that? A. No.

Q. How many barrels had nail holes that came in there? A. Well, I could not say that.

Q. Well, now, you have said.

A. You see, you could not tell, sometimes, until you saw them squirt when you start to roll them, you see; the stuff would kind of start stirring up in the barrel and it would squirt out that little hole.

Q. Well, do you know how many? Can you give us any idea?

A. No, I could not say; I never kept track.

Witness excused.

Mr. BOOTHE.—For a similar reason I would like to call a gentleman from Salem. He wants to get back to-night.

Testimony of F. Von Eschen, for Defendants.

F. VON ESCHEN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Where do you reside? A. Salem.

Q. What is your business?

A. Professor of Chemistry, Willamette University.

Q. Have you ever had any experience in the handling of loganberries and other kinds of berries?

(Testimony of F. Von Eschen.)

A. I have. [345]

Q. How long experience have you had in that matter?

A. In the testing of fruit for the last—in Salem for the last fourteen years, more or less, during the summer and some time during the year.

Q. And how long have you been connected with that institution in Salem? A. Fourteen years.

Q. And you are now connected with them as chemist? A. I am; yes, sir.

Q. I will ask you if you had anything to do in and about the packing plant of Baker at Salem during the season of 1920?

A. You mean the Kurtz packing plant?

Q. Yes, with Kurtz packing plant; were you about that Kurtz packing plant during the season of 1920? A. Yes, sir; I was.

Q. What were you doing there then?

A. Helping Mr. Kurtz and overseeing some of the packing of the fruit.

Q. Did you see them packing these berries for Mr. Baker into barrels?

A. I saw them packing berries in the barrels in the other warehouse, but I do not know to whom the berries belonged; that I can't say.

Q. There was only one other place there that packed?

A. There was only one other place in the warehouse across the track, belonged to some concern.

Q. How were they packing those berries?

A. Dumped into barrels and shoved down with

(Testimony of F. Von Eschen.)

sticks and dump in more berries and filling the barrels.

Q. Were they beating them down in the barrels?

A. Partly, yes.

Q. Did you see any of the berries that came in there to Mr. Baker's plant?

A. You mean during the time that Mr. Baker had the plant?

Q. Yes.

A. Why, during the two days that I understood from Mr. Kurtz that Mr. Baker had the plant I was not there, but the evening before there was some berries came in that were supposed—I understood them to belong to Mr. Baker.

Q. You had something to do with the canning plant? A. Yes.

Q. Did Mr. Baker do any canning there?

A. I understood that he had rented the cannery for two days to do some canning. [346]

Q. Did you see any of the berries he was putting into the cans?

A. I wasn't there while he was canning.

Q. Did you see the berries?

A. The berries that came in that were supposed to go in the cans was the evening before.

Q. What was the condition of the berries?

A. They were not in condition I thought they would keep.

Q. Did you say anything to Mr. Baker about it?

A. Yes, I said to Mr. Baker incidentally that evening, I said I didn't believe they would keep.

(Testimony of F. Von Eschen.)

Q. What did he say?

A. He gave me to understand that he had canned over twenty years or so, that he knew his business, so I said nothing more; it wasn't anything to me.

Q. Professor, when those berries are put into barrels in the method in which you say they were put in, what would be their condition as to fermenting?

A. Why, fermentation begins immediately.

Q. Begins immediately? A. Yes, sir.

Q. Now, suppose those barrels of berries were put on to trucks and hauled down to Portland right away and delivered here to Portland in three and a half to four hours, that would be about fifteen miles and a fraction an hour, what effect would that have on the berries?

A. Fermentation would continue just the same.

Q. Now, when they arrived at Portland and unloaded the berries, would they be naturally fermenting; would they be fermenting on the trucks or would they begin to ferment afterwards; how about that?

A. The fact is that, that the moment that fruit is picked it begins to change, and if fruit is bruised and the bacteria of the outside [347] can reach it, it begins fermentation right away and that fermentation continues until the temperature is reduced sufficient to stop it.

Q. Now, how do they stop that fermentation?

A. You can stop it—that is, practically so, by reduction of temperature.

(Testimony of F. Von Eschen.)

Q. What degree of temperature would reduce that temperature?

A. If it falls below freezing point there is very little fermentation.

Q. Now, if they are fermenting so that the barrels are, we will say, sizzling, are those berries destroyed? A. Not entirely.

Q. And suppose then that they were chilled or frozen and the fermentation had stopped and the temperature was allowed to go up, to, say, thirty-six for one day, gradually go up until it was thirty-six for a day, and they should begin to ferment again and then immediately after that the temperature was lowered again until the fermentation was stopped; would that second fermentation add anything to the damage of the goods?

A. Yes, just to the extent of the amount of that second fermentation, just to that extent.

Q. Now, if the berries were put into the freezer in good condition, sound and good condition, how long had they ought to keep without fermenting if they are in good condition at, say, thirty-five or thirty-six degrees?

A. I would say they ought to keep three or four days under those conditions without doing much damage.

A. And if they had been frozen how long would they be—could they safely be allowed to stand in a temperature of thirty-six degrees?

A. Well, I would not want to leave them more than a week, even if they had been frozen.

(Testimony of F. Von Eschen.)

Mr. BOOTHE.—That is all.

Cross-examination. [348]

(Questions by Mr. SPENCER.)

Professor, you are, you say, instructing, you are in the Willamette University? A. Yes, sir.

Q. And have been there how long?

A. Fourteen years.

Q. Have you operated a packing plant, packing loganberries yourself?

A. Not operated, that is not personally, no, owned a plant and operated it, no.

Q. And you haven't had much to do with the practical end of handling and marketing these loganberries packed in barrels, have you?

A. Not outside of what testing of the fruit I have made that came from barrels and the fruit that was put in barrels.

Q. Your work there at Salem down around the plant was in connection with Mr. Kurtz's canning operations?

A. More than the barreling.

Q. More than what?

A. More than with the barreling operation.

Q. Well, Mr. Kurtz didn't barrel any berries there at that time? A. Well, somebody did.

Q. Well, did you ever—do you mean you had anything to do with Mr. Baker's barreling operations?

A. Well, I say I had nothing to do with that barreling operations.

Q. The fact is you didn't have anything to do with the barreling operations at all?

(Testimony of F. Von Eschen.)

A. Well, if you want to call it that; I condemned some berries somebody wanted to barrel there, somebody wanted to barrel.

Q. Mr. Kurtz didn't barrel berries?

A. I don't know who was barreling. I didn't ask. Some berries came they wanted to barrel and I said, "No, you can't; they are not fit."

Q. Who did? A. I don't know who did.

Q. Where was that, at the Kurtz plant?

A. Yes. [349]

Q. Did you understand that Kurtz was barreling berries?

A. That was my understanding. I never asked. The berries were not fit for barreling and I simply said, "You cannot barrel those, they are not fit."

Q. Was that this last day you spoke of; before Mr. Baker took it over?

A. I don't remember what day that was, no; I cannot tell you that.

Q. Who asked you whether the berries were fit to barrel? A. Nobody asked me?

Q. What you have to do?

A. I simply saw the berries that were unfit to barrel and my understanding at the time was that Kurtz was barreling berries. I never asked anybody. I said, "You cannot barrel those berries, they are not fit."

Q. Did you have authority?

A. Mr. Kurtz told me anything around the plant I saw was not right to go after it.

Q. You think it was some berries for Mr. Kurtz?

(Testimony of F. Von Eschen.)

A. Yes, that was my understanding at the time.

Q. And you were not undertaking to say to Mr. Baker or his men what they could do, were you?

A. No, certainly not.

Q. Well, Mr. Kurtz testified, as I recall, here, to-day, that the only barreling operation he did was last year, 1921. Now, if that is true, why, Mr. Kurtz must not have been barreling any berries in 1920?

A. I said a moment ago I didn't know who was barreling.

Q. Now, when was this that you talked to Mr. Baker about the berries that might or might not be fit for canning?

A. As I remember it now, he came through the plant with Mr. Kurtz.

Q. When was that? A. Well, that was—

Q. Do you remember the day? [350]

A. I think it was the day before going, as I remember it now, as Mr. Kurtz told me Mr. Baker had hired the cannery for two days, or rented the cannery two days; that is what I understood from Mr. Kurtz.

Q. Those berries, then, that you are now talking about, that you saw there the day before Mr. Baker took over the canning of berries for two days, those, then, were not the the finest selected berries?

A. No, they were not.

Q. I understand from you, Professor, that fermentation starts in just as soon as the berries are picked? A. It does.

(Testimony of F. Von Eschen.)

Q. And once it starts, why, it is always there.

A. It is always there.

Q. So that you think after a berry is picked there isn't any such thing as them being free from fermentation? A. No, sir, there is not.

COURT.—How long will it continue before the berries are unfit for use, for consumption?

A. That depends on the condition of your berry when it is picked, and also on the temperature.

COURT.—Well, how long, on the average?

A. On the average, in the early part of the season you can hold your berries at an ordinary temperature, if it is not too warm, for two days at least, or may be three; but if you take the last part of the season, when the berries are already in bad condition, you find they will not stand up three days.

Q. Well, they will stand up one day, won't they?

A. Some will and some won't.

Q. You know it is a common practice to pack berries, and pack them successfully, all during the month of August, that stand for a day before they get into the packing plant; don't you know that to be true.

A. They are not in very good condition when they come in. [351]

Q. Are you familiar with the extent of the loganberry business or the barreling business in loganberries in the Willamette Valley?

A. To a certain extent.

Q. How many barrels of loganberries are handled in the Willamette Valley at packing plants, are

(Testimony of F. Von Eschen.)

packed in the plants and then transferred by one means or another to the cold-storage plant?

A. That I do not know.

Q. But you do know that is a successful business, carried on quite successfully each year?

A. It can be carried on successfully.

Q. And don't you know that Mr. Baker has been successful in carrying on that business in the Willamette Valley in the past few years?

A. That is what he says.

Q. Well, you know that to be true from your knowledge of affairs around Salem and in the Willamette Valley; isn't that true?

A. Well, he has had some trouble.

Q. Well, he has had some trouble with these?

A. Yes.

Q. But wouldn't you rather expect him to have some trouble, if after he stored his berries in a cold-storage plant the temperature started up on the fourth day of August, the temperature in the room where they were stored began to get warmer and finally on the sixteenth day of August it reached thirty-five or thirty-six degrees and remained there until the twentieth day of August, and then they began to put it back again and claimed to get it back to twenty-seven degrees by the twenty-seventh of August; wouldn't you expect that the fruit stored in there would be affected by the process?

A. Was it frozen before? What was the temperature at which it was before?

(Testimony of F. Von Eschen.)

Q. It was subjected to a temperature of twenty-six degrees. A. Twenty-six degrees?

Q. Yes.

A. Then at what time did it begin to go up?

[352]

Q. Started up on the fourth of August?

A. Reached thirty-six on what day?

Q. On the sixteenth.

A. On the sixteenth. When did it start down?

Q. Said to be on the twentieth.

A. Four days. I would say if that fruit was good that change did not hurt it very much, if any.

Q. It would hurt it, would it?

A. I have my doubts whether it would do any harm.

Q. You don't think it would do any hurt at all?

A. I have my doubts whether it would be any hurt.

Q. Now, if during this intervening period stuff was moved into the cold-storage plant and right out of the field, out of the packing plant, was shoved into a cold-storage room with a temperature of thirty-five or thirty-six degrees, what would be the effect on that stuff?

A. That stuff would ferment, because it is hot when it comes in.

Q. And that stuff going in there hot when it went in would not have a very good effect on the balance of the stuff that was already in there, would it, with the temperature around thirty-five or thirty-six?

(Testimony of F. Von Eschen.)

A. Absolutely no effect except as the temperature affects it.

Mr. SPENCER.—That is all.

Redirect Examination.

Q. I wish to make this suggestion of the temperature rising before the sixteenth to thirty-six degrees and remaining thirty-six degrees to the twentieth. I want to qualify that somewhat and ask you if the temperature got to thirty-six and went back from thirty-six and by the twentieth it was twenty-nine, that would be a better, more favorable condition, would it not?

Mr. SPENCER.—I object, there is no testimony to that effect. [353] Mr. Reid stated positively when he was down there with Baker on the twentieth the temperature was thirty-six, and also it was thirty-five or thirty-six on the sixteenth of August.

Mr. BOOTHE.—The reason I am asking that is, I am going to bring the engineer to testify what the temperature was. These gentlemen are mistaken on that.

A. Repeat that question.

Q. (Read.)

Mr. SPENCER.—I object to that as not being based upon any evidence shown in this case.

COURT.—On the theory that he will introduce evidence.

Mr. SPENCER.—All right.

A. Then I understand that the temperature went

(Testimony of F. Von Eschen.)

to thirty-five on the sixteenth and back to twenty-nine on the twentieth? Q. Yes.

A. Instead of remaining at thirty-five or thirty-six up to the twentieth?

Q. Yes.

A. That is a more favorable condition.

Q. That is the point I want to get at. That is all. Witness excused.

**Testimony of E. L. Patton, for Defendants
(Recalled—Cross-examination).**

E. L. PATTON resumes the stand.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. SPENCER.—I would like to take a squint at that book, if I might, that Mr. Patton testified from.

Q. Mr. Patton, where—show me where your August dates are here, will you please?

(Witness indicates.)

Q. Mr. Patton, what kind of a record did you keep of the action of these barrels in the basement after they went in there? [354]

A. We could not keep any record of a great many of them on account that the heads were blown out and destroyed the number of the barrels.

Q. Well, for example, take a barrel that you had noted here like as having received on August first.

A. Yes, sir.

Q. The first number is in ink; are they the numbers of the barrels?

(Testimony of E. L. Patton.)

A. That is the number of the barrel, yes.

Q. 421. Now, suppose that that barrel would have blown its head on the 13th of August, would you make a record of that?

A. Could not—that is, could not do it very well, the way the barrels were piled up in the basement.

Q. Well, now, when did you make up this record of barrels blown? A. That is when they came in.

Q. By when they came in what do you mean?

A. The date that they came in.

Q. I know, but you were not there in the evenings when they came in?

A. I took the numbers of all the barrels that came in during the night also—the next day.

Q. Now, the fact is that most of these, the greater part of these barrels that you have marked on your record as blown happened after the fourth day of August? A. After the fourth day of August.

Q. It is—here, you started in, when you first gave us the numbers, starting in on August seventh—or, first of all, in August there was one on the fifth, then the seventh, then the ninth, then the eleventh, twelfth and thirteenth.

A. Didn't I give you any on the first?

Q. Yes, you gave four barrels on the first and one on the second, but the greater part of those were after the fourth day of August, weren't they?

A. I guess they are; whatever date is down there.

(Testimony of E. L. Patton.)

Q. And do you know when the temperature started to go up? A. No, sir.

Q. You didn't have anything to do with that?

A. I had nothing to do with the temperature.

Q. Well, if the temperature started to go up on the fourth day of August in the cooling-room, it was after that date that most of these barrels blowed, that is true, isn't it?

A. I guess it was; I don't know what date it started to go up.

Q. I understood you to say, Mr. Patten, that so far as you were concerned you saw no barrels with nail holes that had been put in?

A. I didn't notice any, no, sir; they might have been put in there when the barrels were rolled in the basement.

Q. You were around there quite a good deal, weren't you? A. Yes, sir.

Q. And you were the man that made up these records? A. Yes, sir.

Q. And you were the man that made up these warehouse receipts that were mailed to Mr. Baker each day? A. Yes, sir.

Q. And you didn't see any barrels with any nail holes?

A. I didn't notice any. They might have been there, but I didn't notice any. I had men there to stand the barrels on end and as soon as they had the barrels on end, why, we drove nail holes in them in order to save the barrels as much as we could.

Q. And you, after the fourth day of August you

(Testimony of E. L. Patton.)

drove nail holes in practically all of the barrels that were down there?

A. Yes, because they came in such shape we done that to hold all we could of them.

Q. Practically all of the barrels? A. Yes, sir.

Q. But many of those barrels that were in there, that were there after the fourth of August, had come in July, hadn't they?

A. They were all in good shape; that is most of them.

Q. You said you drove nail holes in practically all of them. [356]

A. All of them that is after August first; that is the latter part of the season. The first ones brought in were practically in pretty good shape; that is the majority of them.

Q. But after about the fourth of August most all of the barrels down there began to show distress?

A. A good many of them; yes, sir.

Q. Until they got up to about seventy-five per cent of the barrels in the basement showing distress after, say, the fourth of August?

A. Well, I don't know how many.

Q. You would not undertake to say the per cent?

A. I would not want to say the per cent; no, sir.

Q. But you are certain that a lot more of them that were in the basement on and after the fourth of August showed distress than they had shown in previous days? A. The barrels as they came in?

Q. Those that were already there on the fourth of

(Testimony of E. L. Patton.)

August or afterwards, that had been put in before, showed distress after that?

A. No, very few of them.

Q. Well, the percentage of barrels in distress of the total barrels down there in distress after the fourth of August was much larger than any prior time, wasn't it?

A. That was on account of the berries coming in, yes, sir.

Q. And it was on account, something, of the temperature in the cold room, wasn't it?

A. It was on account of the state of the berries as they came in, much warmer weather, the berries were much riper, they would ferment a lot quicker.

Q. And they were put down there in a room which was supposed to be a cold room, but it was in fact not a cold room; isn't that true?

A. Well, I don't know what the temperature was; I could not tell you that. The engineer has the record of that. [357]

Q. Now, Mr. Patton, you don't undertake to say Mr. Van Doren was there when all the cars were shipped out? A. No, sir.

Q. And you don't undertake to say that the contents of the barrels shipped out were in good condition?

A. I could not tell you about the contents, only the outer appearance of the barrels.

Q. The barrels that were shipped out there were not in such condition but that the railroad company in accepting them noted on the bill of lading the

(Testimony of E. L. Patton.)

fact that the heads were stained? A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. Along there in August, after the first of August, weren't you—you were shipping out?

A. I could not give the date.

Q. Do you know whether or not you were shipping out barrels after the fourth of August and before the twenty-first?

A. I could not tell you what date it was; I know we were shipping out berries.

Q. Shipping out berries right along there, weren't you? A. Yes, sir.

Q. And some of these berries you were shipping out had never got any temperature below thirty-five degrees?

A. The berries that were shipped out started to ship out the first ones; we commenced at the oldest lot first and ran down the line. We commenced at barrel No. 1 as near as I can remember.

Q. Now, have you any record of that?

A. They have a record, yes, sir.

Q. Where is that record?

A. I believe Mr. Reid has it.

Q. Have you a record of the numbers of the barrels that have been shipped out?

A. I believe Mr. Boothe has that, or Mr. Reid.

Q. Do you want us to understand that that record shows that the oldest berries of all were shipped out first?

A. I think we commenced at number one. I would not say that that was the first car, but that is

(Testimony of E. L. Patton.)

the way I understood, to go down [358] the line and ship out the oldest lot first. I am not sure, I could not swear to it, but we have a record.

Q. Would you produce that record?

A. Mr. Reid has it, or Mr. Boothe.

Q. Are you familiar with it?

A. I know my own writing.

Q. This is your record, is it?

A. It is a record I made myself of all barrels that went out.

Mr. SPENCER.—I would like to have you get the record, if you can. You have the record, Mr. Boothe?

Mr. WILBUR REID.—The record we have is the number of the barrels. I haven't got it right here, no, sir; it is on file in our office.

Mr. SPENCER.—I would like to have the witness produce that record in the morning, your Honor.

COURT.—It is time to adjourn now.

Whereupon proceedings herein adjourned to Thursday, June 15, 1922, at 10:00 A. M.

Portland, Oregon, Thursday, June 15, 1922,
10:00 A. M.

E. L. PATTON resumes the stand.

Cross-examination (Continued).

(Questions by Mr. SPENCER.)

Mr. Patton, referring now to the matter of the trucks unloading barrels there at the warehouse, at the cold-storage plant, when the trucks would come in where would they unload?

(Testimony of E. L. Patton.)

A. Well, sometimes they would unload on Washington Street or on the Washington Street side, and sometimes they would unload on the Stark Street side. We have two entrances.

Q. The cold-storage plant covers a block of property? A. Yes, sir.

Q. And you say you have two entrances?

A. Yes, sir. [359]

Q. Are the entrances in the middle of the block or in the corner?

A. The entrances are practically—reaches on one side practically reaches the half of the block, they are pretty nearly across the block; on the Stark Street side is a platform there with a short entrance near the corner.

Q. Now, the entrances consist of platforms, do they, that extend— A. Doorways, yes, sir.

Q. Doorways? A. Yes, sir.

Q. Do the doorways run immediately into a hall or is there a platform outside?

A. One side, I believe at that time there was just a doorway leading into one hall and on the Washington Street side there was a platform.

Q. And the platform on the Washington Street side ran clear across?

A. Practically the length of the building.

Q. A block long? A. Yes, sir.

Q. And the platform was all outside of the building? A. Yes, sir.

Q. The Stark Street entrance was through a doorway that ran into a hall? A. Yes, sir.

(Testimony of E. L. Patton.)

Q. Where was the elevator that went down into the basement where the cold room was?

A. About in the middle of the block.

Q. In the center?

A. Not right in the center, but practically in the center.

Q. Practically in the center of the block?

A. Yes, sir.

Q. And with reference to the Washington Street entranceway, was there more than one hall or doorway running into this Washington Street platform?

A. Yes, sir.

Q. How many? A. Two.

Q. And did both halls connect up with this elevator? A. Yes, sir.

Q. And how about the hall running from the doorway on the Stark Street side, did that run to the elevator? A. It ran to the elevator also.

Q. And how far, about, was the elevator from the Washington Street platform?

A. I should judge about one hundred and twenty-five feet.

Q. And how far would the elevator be from the Stark Street door, [360] about the same?

A. About seventy-five feet, or close—might be one hundred—something near it.

Q. Then this elevator was one that would carry about four barrels? A. Four to six barrels, yes, sir.

Q. That went down into the basement?

A. Yes, sir.

(Testimony of E. L. Patton.)

Q. And how was the elevator operated?

A. What?

Q. Was there a man to operate the elevator—
separate elevator operator? A. No, sir.

Q. I see. The man that would be trucking barrels down into the basement would operate the elevator. A. Would operate the elevator, yes, sir.

Q. You left—you worked from six o'clock in the morning to six o'clock at night? A. Yes, sir.

Q. And while you were on duty who would truck the barrels down into the basement?

A. I had a day crew to take the barrels down there.

Q. And when you left at six o'clock would you be all cleaned up? A. Yes, sir.

Q. You would not leave any barrels there?

A. No, not any barrels left there. I would have those all checked up and in the basement.

Q. Suppose a truck arrived at five-thirty or five forty-five?

A. By the time he would have it unloaded the night man would be on duty.

Q. Some of the barrels that came in during that day would run over into the night shifts?

A. It might, yes.

Q. And Horne was the night man? A. Yes, sir.

Q. A great number of those barrels came in at night? A. The majority, yes. [361]

Q. Sometimes there would be—how many would you say might come in there one night? Be as

(Testimony of E. L. Patton.)

many as sixty or eighty barrels, possibly more than that?

A. No, there would not be any more than that.

Q. Well, two truckloads and two trailers would make approximately sixty to eighty barrels?

A. About sixty barrels, I should judge, something like that.

Q. Would you say that at no time would there come in at night more than two truckloads of barrels? A. Well, I could not say.

Q. From your checking up of the records in the morning wouldn't you have some idea?

A. Well, I should judge they would may be average two truckloads a night.

Q. Now, how would you get the record of the bad order barrels that you had on your book that you mentioned yesterday?

A. Why, they had mostly the numbers on the barrels, on the lids and whenever we could get hold of a lid, why, then, I could check up on that barrel.

Q. Where would you get that record? What place would you go to get that?

A. On those I had in the book there?

Q. Yes.

A. Why, if I would find the lids blown off I would find them in the barrel.

Q. Would you go in the basement to find them?

A. These that I had there were not blown in the basement, they were blown on the platform.

Q. You were not there at night when they came in?

(Testimony of E. L. Patton.)

A. But the night man was there and made his report. [362]

Q. What was his report, did he make the report on the book?

A. I made the report on that book, but he would show me what there was.

Q. When did you make that report?

A. First thing in the morning.

Q. Always made that the first thing in the morning? A. Yes, sir.

Q. Where did you get this information about the gross and the tare?

A. Sometimes we would find that on the lids, if they were not destroyed too much.

Q. And the lot number, where would you get that?

A. That was our lot number; that is our lot number we put on the barrels. We carry on the same lot number, under the same lot number we put the balance of the barrels.

Q. Well, how would you get that information, if these barrels all blew off the heads?

A. Well, I say, if we could find the deads there.

Q. I notice here in the book, beginning, we will say, August, here is one August 9, 1920.

A. Yes, sir.

Q. Barrel No. 585; the figures 585 and all the other numbers are written out in ink.

A. That is the number of the barrel.

Q. Yes.

A. Well, we copied down the numbers on the sheet

(Testimony of E. L. Patton.)

and then we tally out, check off the barrels from that number.

Q. The word "blown" is written in pencil?

A. Yes, sir.

Q. Way over here on the side of the column. Now, Mr. Patton, you said you had some record which would indicate the dates when the certain barrels would be shipped out? A. Yes, sir.

Q. Have you that record here?

A. I have the date of them.

Q. Have you the record, say, for instance, of barrels shipped out on August nineteenth?

A. Yes, sir. [363]

Q. And as a matter of fact the barrels shipped—does that record show when those barrels went in?

A. No, it don't show when those barrels went in, no, sir.

Q. Does it show the numbers of the barrels?

A. Yes.

Q. What were the number of the barrels shipped out on August nineteenth?

A. From the nineteenth—they ran from number one to 630.

Q. You didn't ship all 630 barrels out?

A. No, sir, we put in one hundred and sometime one hundred and one barrels to the car, but we had to take these barrels in order to get—

Q. You don't mean you shipped out 630 barrels on the nineteenth of August? A. No.

Q. I was asking you from the report.

A. This number on the barrels are the ones shipped out.

(Testimony of E. L. Patton.)

Q. I am trying to get the particular barrels you shipped out on the nineteenth of August.

A. Yes, that is on this list here.

Q. What are they? On the nineteenth of August you made a shipment out? A. Yes.

Q. In a refrigerator-car? A. Yes.

Q. What I am trying to get at is, what are the numbers of the barrels you shipped out on that date.

A. Here are the numbers of the barrels; not the number of barrels, but the number of the barrels.

Q. How many did you ship out on that day?

A. I think it was either one hundred or one hundred and one barrels.

Q. Among those barrels were number 610 to 630, aren't there? A. Yes, sir.

Q. 610 to 630? A. Yes, sir.

Q. And 610 to 630 was the last twenty barrels of the last lot received, weren't they?

A. Yes, sir, they were out of the last lot. [364]

Q. 610 to 630 was the last twenty barrels of the last lot received in August; that is correct?

A. Yes, sir.

Q. And barrels numbered 610 to 630, according to your book here, were received from the fourteenth of August to the nineteenth of August; does that show on the record you have?

A. No, it shows here they were shipped out.

Q. Shipped out on the nineteenth? A. Yes.

Q. And they were received at your cold-storage plant from the fourteenth of August to the nineteenth of August?

(Testimony of E. L. Patton.)

A. Now, on this lot here, I don't know whether that was out of the first lot came in of barrels or the second lot. We had two lots there; we have two lots there that had those same numbers. I don't know whether that was out of the first lot or the second one.

COURT.—Did you number the barrels as they came in?

A. The barrels were all numbered as they came in.

COURT.—The evidence for the plaintiff shows they were numbered consecutively from one up.

A. To a thousand, and then they commenced at one again.

COURT.—Oh.

Q. Could you take this book and relieve that—

A. Well, as I say, I could not tell you whether it was out of the first lot or the second lot.

Q. Do you mean your records would not show you whether the barrels were from the first lot or the second lot? A. No.

JUROR.—Can you tell from the lot numbers?

A. The lot numbers are not on this list.

Q. Can you tell from this book?

A. I could not tell whether they were shipped out at that time or not. It might have been 610 and got it on the first lot, or it might have been on the second lot. I could not tell you. [365]

COURT.—I understood you to say yesterday, Mr. Patton, that they were shipped out in the order that they were received?

(Testimony of E. L. Patton.)

A. As near as we could.

Mr. BOOTHE.—Mr. Reid has another record which showed that.

COURT.—This witness has testified, or he testified yesterday, that he shipped out in the order received in cold storage?

A. Yes, sir, as near as we could.

COURT.—That is a different thing.

A. Because some barrels were so that we could not ship them out.

Q. As a matter of fact barrels 610 to 630 of the first lot had been shipped out before that?

A. Well, I could not tell you.

Q. Well, now, just a minute; I will find number 610 and 630.

A. I picked out what I could there and what the bookkeeper had time to get out this morning.

Mr. SPENCER.—I think that is all.

A. This list here, that commences at one, the car that was shipped out in September 19 commences at one.

COURT.—Didn't run in consecutive order, one, two, three and four? A. No.

COURT.—Did it commence one, two, three, four, five and six? A. Yes, and so on down the list.

COURT.—In regular order?

A. In regular order as near as we could.

COURT.—As near as you could?

A. Well, sometimes a barrel was in condition we could not ship and then we would have to put some other in its place.

(Testimony of E. L. Patton.)

COURT.—This was shipped out August nineteenth? A. Yes.

JUROR.—When were the first two cars shipped?

A. I believe the first car was shipped—I don't know, something like in July. [366]

COURT.—What is the first one you have there?

A. July 26th.

JUROR.—That is what I want to get at.

COURT.—They are not numbered in consecutive order, are they?

A. Not on the paper, no, sir, but we have the numbers here, running from one on up.

COURT.—I notice on this one shipped on August 19 you ran down from 1 to 11, then you jump to 14. A. Yes, sir.

COURT.—Then down to 16. And then you go down—go down to 83 and you jump to 106 and then to 118, 124, and then 193 and 233, and then down as far as 630.

Mr. BOOTHE.—That is all just now. I think you would better remain here a little bit.

JUROR.—You said something about the barrels being too full. A. Yes, sir.

JUROR.—How full were the barrels?

A. Some of them, they were—a barrel, in my judgment, should be not less—filled any more than six inches of the top, and some of them were filled as full as they could get them and get the heads on.

JUROR.—After they were hauled there they were still clear full?

(Testimony of E. L. Patton.)

A. They were full, yes, and something had to give and they were starting gas to form in the barrels, something had to give and the head was the first one to go.

JUROR.—How much would those barrels weigh?

A. The average gross weight on them would average near five hundred pounds.

JUROR.—There was also something said about after this second freezing a good many of the barrels bulged and they had to be bunged. [367]

A. Now, in the freezing, the barrels were filled so that in the freezing of the berries they expand and of course when they are freezing they had to splinter the heads in order to give room. Water will expand in freezing—expand—I don't know how much, but quite a little bit, and the berries will expand more than the water will.

JUROR.—It appears that when they were first frozen there wasn't many that had to be bunged. and later more were bunged on the second freezing.

A. The latter part of the season the barrels had to be bunged on account of the gas forming in there and so I had a man take a nail and drive nail holes in every barrel that came in, in order to save it.

JUROR.—Now, if the barrels were only, say, partly full and it would ferment, form pressure, say five pounds on the barrel, and then the contents were expanded from freezing, would that put additional pressure on them enough to burst them?

A. If the barrel is only partly full of course it would take more than five pounds.

(Testimony of E. L. Patton.)

JUROR.—What I am getting at, if it had fermented to make a small pressure and then expand the contents, would that make an extra pressure and cause them to burst?

A. It would certainly make some pressure, yes, sir, certainly make some extra pressure.

JUROR.—Is there a record of the 398 barrels left in the warehouse, is there any record whether they are first lot or last lot or mixed or what?

A. I don't know. There must be some record there that would show on the barrels. I didn't notice that. I think they are marked L or X—X, I believe. X, and the number of barrels, and of course tare and net of each barrel, that was on the second lot. On the [368] first lot there wasn't anything marked there only the number of barrel, the gross, tare and net.

Mr. SPENCER.—(Resumes examination.) Q. Mr. Patton, you said—I understood you to say that the barrels weighed five hundred pounds?

A. Something like that; that is the gross weight.

Q. Now, I have before me your book here and your book shows—

A. Maybe they don't weigh quite so much.

Q. Shows what they call the net and the gross.

A. Net and gross and tare.

Q. And tare is the weight of the barrel?

A. Weight of the barrel—

Q. I notice running down through here—

A. —what they would weigh.

(Testimony of E. L. Patton.)

Q. In fact I don't find any that run to five hundred.

A. 480. I was only going by what the barrels coming in. Now,—well, 480 and 490.

Q. That is the net weight of the barrel, seems to run here, back August 2d, 419; on the second and third, 430; on the third here is one 415, 406, 412, 414, 430, 427, 425, 421. In fact, Mr. Patton, I don't find a single net weight—

JUROR.—He is talking about gross.

A. I am talking about gross weight.

Q. I don't find a single gross weight that runs to five hundred and this record would be the correct—

A. I was saying it would run near five hundred pounds.

Q. You were making it pretty large?

A. Certainly, because we had barrels in there that would weigh five hundred pounds and more.

COURT.—Let me see this shipping list, please. I want to look at that. On August—this shipping list shows August 12 that [369] barrels numbered from 610 to 613, '14, '15, '16, '17, '18, '20, '21, '24, '26 and '40—630, 631, were shipped on August 12, so that those barrels numbered 630 must have gone out on the 12th to the 19th, all of them?

A. I say 630; now, you will find another 630.

COURT.—I know there is another 630 on the nineteenth, shipped; so both numbers must have gone out either on the twelfth or the nineteenth.

A. Yes.

(Testimony of E. L. Patton.)

Mr. SPENCER.—The barrels numbered 610 to 630 on the last lot could not have gone out on the twelfth, could they, because the record shows they were not received until the 14th of August?

A. No, sir.

Mr. BOOTHE.—I think I have no questions to ask, but I will ask you to remain here.

COURT.—That is all.

Mr. BOOTHE.—Remain here until Mr. Reid brings the other shipping receipt. Call the engineer.

Witness excused.

Testimony of Alec Sharwick, for Defendants.

ALEC SHARWICK, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

What is your business, Mr. Sharwick?

A. Chief Engineer.

Q. Who were you engineer for during the summer of 1920?

A. National Ice and Cold Storage.

Q. Did you keep the record of the temperature on the different rooms in that cold-storage warehouse during that summer?

A. Yes, sir, every two hours. [370]

Q. Did you keep the temperature of the basement three? A. Yes, sir.

(Testimony of Alec Sharwick.)

Q. Is that the room where Mr. Baker's berries were stored? A. Yes, sir.

Q. And will you turn—have you got a record of this temperature at that time? A. Yes, sir.

Q. Will you take your record and tell us what it is? Did you make that record yourself?

A. No, I have three assistant engineers which took the temperature every two hours.

Q. That is made by you or under your direction—this record that is kept of the temperature at that time, is it? A. Yes, sir.

Q. Now, start August first, 1920, and tell what the temperature was on that room at the different days; running up, say, to the twentieth.

A. At eight in the morning shows twenty-nine degrees.

Q. On August first?

A. At ten, twenty-nine degrees; at twelve, twenty-eight degrees; at two, twenty-eight degrees; at four, twenty-eight degrees; at six o'clock twenty-eight degrees, and eight o'clock twenty-eight degrees; ten o'clock twenty-eight degrees; twelve o'clock twenty-eight degrees; two o'clock in the morning, twenty-eight degrees.

Q. That is the morning of the second, then?

A. Yes, second; twenty-eight degrees.

Q. Can you give us by days? Does it run about the same the whole day? A. Yes.

COURT.—Was the temperature twenty-nine degrees all day?

(Testimony of Alec Sharwick.)

A. Twenty-eight degrees; started in twenty-nine in the morning and brought it down one degree and was running twenty-eight degrees until two o'clock next morning.

Q. On the next morning it was how much? On the second it was how much?

A. The next morning, on the second, eight o'clock, she was [371] twenty-eight degrees; ten o'clock twenty-seven degrees.

Q. Just jump—it ran about the same that day; during the day that practically was—tell us what it was the next morning, for instance, the third?

A. The third it is twenty-nine that morning.

Q. And the fourth?

A. The fourth was thirty-one degrees.

Q. The fifth?

A. The fifth was thirty-two degrees.

Q. The sixth? A. Thirty-two degrees.

Q. The seventh? A. Thirty-two degrees.

Q. Eighth? A. Thirty-four degrees.

Q. Ninth? A. Ninth was thirty-four degrees.

Q. Tenth? A. Tenth was thirty-four degrees.

Q. Eleventh?

A. Eleventh was thirty-four degrees.

Q. Twelfth?

A. Twelfth was thirty-five degrees.

Q. Thirteenth?

A. Thirteenth was thirty-five degrees.

Q. Fourteenth?

A. Fourteenth thirty-six degrees.

(Testimony of Alec Sharwick.)

A. Fifteenth?

A. Fifteenth thirty-five degrees.

Q. Sixteenth?

A. Sixteenth thirty-five degrees.

Q. Seventeenth?

A. Seventeenth thirty-four degrees.

Q. You are sure that is thirty-four degrees or thirty-two? A. Thirty-four degrees.

Q. Eighteenth?

A. She went down to thirty-two later in the day.

Q. Later on in the day? A. Yes.

Q. Thirty-four degrees down to thirty-two degrees before the day was over?

A. Now, it was thirty-four degrees in the morning. We generally put the temperature on everything as low as we can.

COURT.—What was it on the eighteenth?

A. Eighteenth is twenty-nine degrees.

Q. The nineteenth?

A. The nineteenth thirty-one degrees.

Q. Nineteenth thirty-one degrees; now, didn't that go down to [372] twenty-nine again during the nineteenth?

A. The nineteenth? Let's see. It was thirty-one at eight o'clock; thirty at ten o'clock; thirty at twelve o'clock; twenty-nine at two o'clock; twenty-nine at four o'clock; twenty-nine at six o'clock; twenty-nine at eight; twenty-nine at ten; twenty-nine at twelve.

Q. Now, give us the twentieth?

A. Twentieth, thirty in the morning.

(Testimony of Alec Sharwick.)

Q. Didn't that go down to twenty-nine during the day?

A. It didn't go down to twenty-nine before ten o'clock at night; ten o'clock, twelve o'clock, two o'clock, four o'clock, six o'clock in the morning.

Q. What is the twenty-first

A. Twenty-first twenty-eight.

Q. Twenty-second? A. Twenty-nine.

Q. Didn't they reduce?

A. No, twenty-second I haven't got.

Q. You haven't got the twenty-second?

A. That is all I have got, from August first to twenty-first; that is all I have here.

Q. Does your record show what the temperature was along just before the first of August?

A. Oh, yes.

Q. And have you got it there?

A. I haven't got it along.

Q. You didn't bring the temperature, then, for only those particular dates we are asking you?

A. No.

Q. Do you know of your own personal knowledge, then, what it was before the first of August; was it higher or lower?

A. Before the first of August should be lower, because August was the hottest month, you see.

Q. You remember it was lower before the first of August? A. Oh, yes.

Mr. BOOTHE.—That is all.

Witness excused. [373]

Testimony of William Reid, for Defendants.

WILLIAM REID, one of the defendants herein, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Reid, you are one of the members of the firm, one of the National Cold Storage plant?

A. Yes, sir.

Q. You are the senior member? A. Yes, sir.

Q. Father of Wilbur Reid, who testified here?

A. Yes, sir.

Q. You don't do very much about the plant, yourself, do you? A. No, I do not.

Q. You are around there, however, a part of the time, are you?

A. Yes, I am around almost all through the day.

Q. I will ask you if at any time while you were there, if you saw any of these goods come in, these Baker goods that have been testified about?

A. Yes, I have seen the barrels come in, in fact I signed up for a good many of them.

Q. You signed up for them yourself?

A. Yes, sir.

Q. Do you know about how many you signed for?

A. I could not tell you exactly, but a number of truckloads came in.

Q. What was the condition of those berries when you signed, when you received them?

A. I noticed there was a number of them in bad condition, and I also called the foreman's atten-

(Testimony of William Reid.)

tion to it. I called his attention to it several times. I says: "Ed, we are going to have trouble with these berries."

Mr. SPENCER.—I don't think the conversation he had with this foreman ought to be—

Q. All right. You called the foreman's attention to it? A. Yes.

Q. What was the trouble with the barrels?
[374]

A. Some of them were sizzling out and when you rolled them over the juice would run out.

Q. What did you do with those barrels when you received them?

A. They were put in the basement, and bunged, as we call it.

Q. Did you have any arrangement with Mr. Baker, anything said to you, what should be done with those barrels if any should come in bad condition?

A. I have none. I understood from Mr. Baker, I heard him say if a barrel came in in distress to put a nail hole in and bung it.

Q. You considered it your duty to best preserve those berries was to put them down there and bung them? A. Yes, sir.

Q. That is what you did?

A. Yes, that is what I did.

Q. Did you use your best judgment in taking care of them under his instructions? A. I did.

Q. Mr. Reid, something has been said about a conversation had with Mr. Baker relative to trying

(Testimony of William Reid.)

to adjust this alleged claim. A. Yes.

Q. Will you state what the conversation was between you and Mr. Baker, on your side?

A. Mr. Baker and that other gentleman—what is his name?

Q. Von Kesler.

A. Yes; they came over there and they done most of the talking and I think they made two trips there and they finally submitted a proposition to my son and wanted to—agreeing for so much by pounds, you know, I think it was seventeen cents for so many barrels, and they put in one hundred barrels at thirteen cents and I think I told Mr. Baker, after they fetched over their written agreement that I would think the matter over and would meet them at the Benson Hotel that evening. I didn't sign it at that time.

Q. Did you agree to sign it?

A. I don't think I did agree to sign [375] it. I thought I would better take the matter up with you before doing it. I thought in my own mind, I thought it was taking a pretty big risk on myself to guarantee the price for berries in Chicago when they were taken there and tested. You know what that means.

Q. Now, what was the result of the conversation you had in the Benson Hotel and who was present?

A. Well, there was yourself and Mr. Baker and this other gentleman—

Q. Von Kesler? A. Yes, and myself.

Q. Was Wilbur Reid there?

(Testimony of William Reid.)

A. Wilbur. I think there was not very much of a conversation. I merely told Mr. Baker to go on and handle his berries and whatever damages was done them, why, I was willing to meet him like a man on that, but I could not sign that agreement.

Q. Did you ask him to state to you how much his damage was that he claimed from you?

A. He could not give me that answer.

Q. I know; did you ask him for it?

A. I think I did, yes.

Q. Wasn't that about the last thing that was said?

A. That was the last that was said, and I pulled out my agreement and handed it to him.

Q. Didn't you say something to him like this: "Mr. Baker, if I have damaged your goods, let me know what it is and I will see what I can do toward paying it"?

A. Something to that effect is what I said then.

Q. And he refused to do that, did he? A. Yes.

Q. And that was the end of the meeting?

A. That was the end of the meeting.

Q. Now, something has been said, Mr. Reid, about the sale of these goods by the sheriff for taxes; you know something about that, do you?

A. I know a little something. The sheriff came over there with an attachment or a levy on them—attachment.

Q. Came to sell them? [376]

A. He was going to sell them and there was nobody bid on them.

(Testimony of William Reid.)

Q. Was the sale postponed?

A. It was postponed for, I think, two weeks.

Q. And then was there anybody there to bid on them? A. No, there was not.

Q. And then what was done?

A. In the meantime Mr. Baker had been in to see something about it and he said they overcharged him—overtaxed him.

Q. Did he tell you?

A. Yes, sir; he told it right in the office there and that was the last I saw of Mr. Baker.

Q. And he wasn't present at the time this sale took place? A. No, sir.

Q. Now, what did you do about the sale, when it was offered for sale?

A. Well, they were going to—there was nobody to bid on them and I bid them in to protect Mr. Baker and ourselves.

Q. Do you remember how much you paid for the taxes?

A. Why, I think the whole thing amounted to something like eleven hundred dollars.

Q. Now, what did you do, then, after that? Did you notify Mr. Baker? A. I think we did.

Q. How?

A. I think by letter; at least you have a letter there.

Q. What did you notify him?

A. Why, that we bought the berries in and paid his taxes. I can't really say just to the effect, but that is the sum and substance of it.

(Testimony of William Reid.)

Q. Did you ask him to reimburse you and he could have his goods again any time after that?

A. I think we did.

Mr. SPENCER.—There is no question but what the stuff was bought in by this gentleman at the tax sale and Mr. Baker knows about it.

A. I merely done it to protect Mr. Baker's interests. He could have bought a certain lot of them berries to satisfy the taxes but nobody set a [377] price on them and I bought them as a whole.

Q. And you were willing at that time to let Mr. Baker have his goods and pay you back, were you?

A. Why, sure.

Q. Are you still willing to let him pay you back?

A. They are his berries yet.

Mr. SPENCER.—I don't see the materiality of this. I object to it as immaterial.

Mr. BOOTHE.—We are not trying to take his berries away from him.

COURT.—Nobody is claiming but what he could have gotten the berries if he wanted them, but he says they are spoiled.

Mr. BOOTHE.—They brought this question out and I wanted their understanding.

Mr. SPENCER.—They said they were merchantable berries and I just brought out that they were sold for taxes and nobody would bid for them.

Mr. BOOTHE.—I don't know as that is any proof they were not merchantable berries. I didn't care to say anything about this, your Honor, but as

(Testimony of E. L. Patton.)

long as they brought it out before the jury I want it explained.

COURT.—He has explained it; he bought them in for taxes.

Witness excused.

**Testimony of E. L. Patton, for Defendants
(Recalled).**

E. L. PATTON, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Patton, have you any additional statement, now, regarding those barrels that were shipped out—those that were shipped on August nineteenth?
[378]

Mr. SPENCER.—He has already answered that.

COURT.—On the nineteenth? He had the shipping order here a moment ago.

Mr. SPENCER.—Your Honor asked a question that cleared that.

COURT.—Yes.

Q. Then have you any on the twenty-sixth?

A. Of that month?

Q. Of July?

A. July, yes, sir; one carload on the twenty-sixth.

Q. Now, does that statement that you have there show the number of the cars and the list?

A. This—it shows the number of the car and also the list of the barrels that went out.

(Testimony of E. L. Patton.)

Q. Now, what cars were shipped, according to that list, now?

COURT.—What cars or what barrels?

Q. What barrels were shipped?

A. Well, they were ranging from number one up to—well, they are mixed all in here, the numbers are.

Q. They are not put there consecutively, are they? A. No, sir; not on this car.

Q. How many barrels were there in that car?

A. Now, I think there was one hundred or one hundred and one. That is all we could get in the car, was from one hundred to one hundred and one barrels.

COURT.—Doesn't the shipping order show?

A. I haven't got it.

COURT.—You haven't footed it up?

A. I haven't footed it up.

Q. You don't remember whether it wasn't one hundred and five?

A. It might have been, I haven't counted it up.

Q. Those were the barrels shipped to Best Clymer, St. Louis, Missouri?

Mr. SPENCER.—That is admitted, that it is the car that went to Best Clymer.

A. It is an I. C. car.

Witness excused. [379]

**Testimony of Wilbur P. Reid, for Defendants
(Recalled).**

WILBUR P. REID, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Reid, you made some statement regarding the temperature on your direct examination. Have you refreshed your memory now and are you clear on that subject, as to what the temperature was, say, from August on up to the twentieth?

A. The temperature on the sixteenth of August was thirty-five.

COURT.—You are testifying from your engineer's reports, are you?

A. We have the engineer's report here.

COURT.—He has testified to that.

Q. We have that now, Mr. Reid. You were testifying yesterday about it as of the twentieth being thirty-six at the time you had the conversation with Mr. Baker.

A. After refreshing my mind on that and going back to the records, the temperature was a colder temperature than that on the twentieth.

Q. That is what I wanted you to explain, that you are mistaken.

A. Yes; yes, our records will show.

Mr. BOOTHE.—That is all.

Witness excused.

Testimony of Hannis Loy, for Defendants.

HANNIS LOY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Loy, what is your business? I will ask you, what business—have you ever been engaged in the business of handling berries, loganberries, for instance? [380] A. In what shape?

Q. Storing them, buying and selling, putting them in cold storage, or anything of that kind.

A. I have.

Q. What experience have you had in that line?

A. Well, I think I am the pioneer in Oregon.

Q. Well, for whom have you been employed in that capacity? A. Wadhams & Kerr Brothers.

Q. How long were you in their employ?

A. Nine years.

Q. And what did you have to do with regard to berries at that time?

A. We operated a preserving plant, a canning plant, and it was I had charge of that department.

Q. How long did you say that was?

A. About nine years; between eight and nine years.

Q. Did you handle large quantities of berries during that time? A. Yes, quite a lot of them.

Q. Have you had experience enough, do you think, with berries to judge their condition or quality? A. I have.

(Testimony of Hannis Loy.)

Q. I will ask you if you have ever examined the plant of the National Cold Storage and Ice Company with reference to those goods belonging to Mr. H. A. Baker? A. I have.

Q. How many times have you seen that plant?

A. The plant, not including the goods?

Q. The goods, yes; how many times have you seen those goods?

A. I should judge half a dozen times.

Q. Do you remember how many barrels there were that you examined?

A. I could not say what I examined. I examined probably twenty-five or thirty with the heads out.

Q. Now, state to the jury when you looked at those goods, what their condition appeared to be to you, from the outside—from outside appearance, first. [381]

A. They were, I should judge from the appearance, when they were packed they were overripe fruit.

COURT.—You are referring to the ones that are now in controversy in this case?

Mr. BOOTHE.—Now in controversy, these 398 barrels.

Q. You recognize the 398 barrels here in controversy, do you? A. Yes.

Q. Now, what did you say your opinion was as to them?

A. My opinion as to those that I examined was overripe fruit, I should judge, when they were packed.

(Testimony of Hannis Loy.)

Q. I don't know whether you saw them when they were fermenting or not; did you?

A. No, sir. Just a moment. No, not while they were fermenting, I didn't go there.

Q. Did you examine—make a thorough examination of those barrels, a chemical examination, you might say, or a test, as to their quality?

A. I made a practical test as to their use in the manufacture of jelly and jam.

Q. Now, what did you do? Tell the jury what you did in order to make a test of those berries?

A. In order to qualify them for jelly purposes they should have a certain amount of pectin in them; and pectin is in three stages; that is, it is first qualified as pectose, pectin and pectic acid. Pectose is the undeveloped acid and pectin is when it is in proper shape for that purpose, but pectic acid is when they are started fermentation or decay or overripe stage of the fruit. I tried a practical test by boiling this jelly, bringing it to a jell and the one barrel which had a head in it, I had taken out the juice, that apparently from the outside looked all right, the juice I got was a very thick, gooey mass; you would not call it jelly or you would not call it syrup. The open barrel which I boiled down brought only a thick heavy syrup. [382] I gave it an alcohol test for solids of pectin and it gave a very slight test of pectin, which gave me the theory that the fruit was in a very ripe stage when it was packed; also that the second barrel which had been blown open showed just a slight tinge of pectin

(Testimony of Hannis Loy.)

matter, pectin solids in the solution. The microscopic test showed a considerable amount of mould spores, which naturally would show in stuff that had been exposed of that kind, which could come while exposed in the open, in the barrel, or while the fruit had been picked in the fall. The logan-berry when it has shown a fermentation, when you take a pomace and chew it in the mouth it gives you somewhat of a flavor as if you would chew clover hay; that is the sugar has departed and developed into alcohol, and in these barrels the alcohol evidently had evaporated through the freezing.

Q. Now, did you re-process one of those barrels, you say? A. I re-processed two barrels.

Q. What barrels did you re-process? Did you re-process one that had been blown out?

A. Yes, I re-processed one barrel that had been blown and one apparently that had not been blown; that is, the barrel from outside appearance looked to be in good shape.

Q. Now, what did you do in re-processing them?

A. I added a sufficient amount of sugar to the berry to bring it back into the state in which it had been prior to the state of fermentation.

Q. What was the result of that re-processing of those two barrels? Upon comparison was one of them any different from the other? A. None.

Q. The one that had blown up showed as good a condition, you say, as the one that had not been blown up? A. Practically.

(Testimony of Hannis Loy.)

Q. Why did you re-process the one that had not been blown up?

A. To get the comparison between the two.
[383]

Q. Did you examine any of those barrels of berries that had not blown up? A. I did.

Q. What condition did you find them to be in?

A. I gave that a moment ago, Mr. Boothe.

Q. I was talking here and I probably did not get it. Will you state again for me?

A. I have found from appearance that they had been packed in a very high state—a very ripening stage.

Q. Well, are those berries ruined?

A. No, I would not say that they were ruined.

Q. Have they in your opinion a commercial value yet? A. Yes.

Q. Do you know how many barrels there are there that have not blown or fermented?

A. No, except I was told that there was so many with blown heads. I didn't examine the entire lot in the storage-room at the time. I saw a considerable amount that looked from outside appearance in good condition, and quite a bunch of them there that had their heads blown out.

Q. When those berries were brought there, if they were brought in a fermenting condition, and put into the cold-storage plant and frozen, would you say that they were damaged and ruined then?

A. What loss was visible in the berries had taken place already before they were placed in storage.

(Testimony of Hannis Loy.)

Q. How is that?

A. The visible loss in the fruit had taken place in the fruit before they were placed in storage.

Q. Does the freezing of the berry cure the damage that had resulted by their fermentation before they went in?

A. It will eliminate some of the damage to it, in so far as that if the barrel is open and exposed the freezing causes an evaporation and [384] consequently the alcohol will evaporate but it will leave a shortage of sugar by the alcohol evaporation.

Q. What effect does it have upon berries in hauling them, say, from Salem in trucks about fifty miles away, and bringing them down in three and a half to four hours, what effect would that have on the berries, as to their fermentation?

A. I would say a trip like that would break down the berries sufficiently to cause a fermentation before they were placed in cold storage.

Q. If they were put into barrels at Salem and mashed down slightly, would that have a tendency to cause them to ferment? A. Yes.

Q. And when might they begin to ferment after that was done?

A. The berries would start fermentation immediately on the breaking down of the walls of the berry.

Q. Now, Mr. Loy, if those berries, when delivered to the warehouse, were in a fermenting condition and they were put in the freezer and frozen, the fermentation stopped, and the temperature should

(Testimony of Hannis Loy.)

happen to go up to, say, thirty-six degrees, gradually, from twenty-nine up to thirty-six degrees in a period of some ten or twelve days, and the berries should ferment again, would you say that they were damaged or in a worse condition than they were before the temperature was allowed to rise the second time?

A. Give me that question again, Mr. Boothe.

Q. (Read.)

A. I don't know as the temperature arriving at thirty-six would cause a sufficient or a thawing out in twelve days' period to start the fermentation again in the fruit. I don't think it would, because in shipping frozen fruits in a car the average temperature on a refrigerator, salted and iced, is about forty-five degrees and the average shipment of a car takes ten days to two weeks, take for delivery in the east. [385]

Q. If those goods were in good condition when they were put in there would it be reasonable to allow the temperature to go to thirty-six degrees without endangering them for a period of a week or two?

A. I would say it would not endanger the fruit any more than any damage that had been done prior to that; although I will say this, that it does not do fruit any good to have it thaw out and refrozen two or three times. Every time it is thawed out there is a breaking down of the fruit.

Q. I want to show you some samples, Mr. Loy, I will show you the two samples, Mr. Loy; I don't

(Testimony of Hannis Loy.)

know whether you took them out of the barrels or not and put them in there, but we will show who did. Do those look anything like the berries that you examined?

A. Well, I could not say that these are the berries, but I would say from a general appearance that this fruit that I took out of these barrels, these two barrels I re-processed, were in this broken down condition when I re-processed them.

Q. How are those for color?

A. They are very good.

Mr. BOOTHE.—I will state that we will show by another witness here that these berries are out of the two barrels that Mr. Loy re-processed. They were taken out a few days ago.

Q. Do you want to make any further examination, inspection of those, Mr. Loy, to testify as to what the condition of that berry is?

JUROR.—I would like to ask a question, if this test was taken after the thermometer had been up to thirty-six or before? A. Yes.

JUROR.—It was after?

A. This test was taken when this re-processing was done, during the latter part of September, 1921. [386]

Q. Now, that little sizzling there seemed to cause some merriment. What do you have to explain about that, Mr. Loy, if anything?

A. Why, the addition of this sugar to this fruit which had once developed fermentation would naturally develop again into a fermenting stage after

(Testimony of Hannis Loy.)

thawing out and keeping to the last minute in a jar, a space like that, with that amount of oxygen added to the jar which laid between the lid and fruit, naturally would start fermentation.

Q. Any good fruit would do that, would it?

A. Yes.

COURT.—Was the jar sealed air-tight?

A. That would not matter, the oxygen, when you sealed the jar, was already in the jar, just simply.

COURT.—Was the fruit you tested in the same condition this was in? A. Yes.

COURT.—Liquid?

A. No, they were frozen at the time; the one barrel was frozen quite solid, the one that had the head out, and the other was in a more solid—

COURT.—But when you thawed it out it became liquid like these? A. Yes.

COURT.—It wasn't in the shape of a berry at all? A. No.

Q. Neither one of them was in the shape of a berry? A. No, I think that was my evidence.

Q. Will you say now, Mr. Loy, that those berries in that condition there are merchantable berries, good for food? A. Absolutely.

COURT.—Would you call them berries at all?

A. The way that they ship this fruit.

COURT.—Would you call them berries at all, or isn't that just simply a liquid formation of berries?

A. No, the solid of the fruit is still in there.

Mr. SPENCER.—I think the witness called it a gooey mass. [387]

(Testimony of Hannis Loy.)

A. A broken down mass.

COURT.—You would not be able to sell them in the market, to a groceryman or housewife, as berries?

A. No, there is not any fruit that goes east to the manufacturer but in that condition.

COURT.—It is not used for table use or anything of that kind?

A. No, it is used for straight manufacturing, and jams and jelly stuff.

Q. That is the general rule, those berries shipped in barrels that way are used for jams, and so forth?

A. Yes.

Q. They are not used on the table as berries, are they? A. No.

Q. It is not expected at all with any of them, is it? A. No.

Mr. BOOTHE.—That is all.

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Loy, you say that these cells broke down by fermentation? A. Yes.

Q. And that that is one of the different things that spoils the product, is that the idea?

A. When the breaking down of the fruit takes place it is after an overripening stage condition of the fruit or a fermentative stage of the fruit.

Q. When you make loganberry juice you break the cells; what do you do with the cells then?

A. You would break them down to get the juice out of them.

(Testimony of Hannis Loy.)

Q. Well, loganberry juice is a pretty well-recognized staple article that is bought and sold, isn't it?

A. I should judge that from the shipping of loganberry juice out of the State of Oregon and Washington would be the only place where [388] they would produce a loganberry juice. I don't think it is possible that they would ship their berries back east and press them.

Q. Have you ever shipped any yourself, east?

A. Yes.

Q. Shipped any loganberries east? A. Yes.

Q. For loganberry juice? A. No.

Q. Have been engaged in that business; but I understood you to say that the breaking down of the cells causes fermentation.

A. The fermentation causes the breaking down of the cells.

Q. I see; that is the way it happens. Now, your idea is that, first of all, alcohol is produced as one of the steps in fermentation of loganberries, isn't it? A. Yes.

Q. That is necessarily so, isn't it? A. Yes.

Q. And what does fermentation—when fermentation starts what is produced besides alcohol?

A. Well, it is produced—the breaking down of the cells, which shows decay of the fruit.

Q. What is the gas that is produced?

A. The loganberry has a gas which is possibly unknown to any other fruit except that of loganberry; that is why it is a hard fruit to handle.

Q. What is the name of the gas?

(Testimony of Hannis Loy.)

A. Well, I could not say.

Q. Oh, it has not any name?

A. Oh, I suppose it is carbonic gas, I suppose.

Q. Carbonic acid gas?

A. Yes, it is an acid formation of the gas.

Q. Well, that is not a gas that was unheard of until the loganberry was started, is it?

A. Oh, for sure, I suppose that acid has always been in existence, but I say the loganberry has an acid qualification which no other fruit has.

Q. Now, you said that this alcohol being produced as the result of fermentation, that the freezing process causes evaporation of the [389] of the alcohol; is that your idea?

A. It would if the barrel was exposed open. Of course where the barrel was headed up airtight it could not evaporate, still be retained within the barrel.

Q. Well, if fermentation causes alcohol and when the barrel is frozen, does the alcohol evaporate?

A. If there is an escape for the alcohol vapors, yes.

Q. Supposing there is not any escape, does the alcohol stay there?

A. Absolutely it would stay there.

Q. And then when the barrel is opened up it would show alcohol afterwards? A. Absolutely.

Q. Produce alcohol?

A. That vapor would evaporate, then, when the fruit was thawed out and the lid taken out of the barrel.

(Testimony of Hannis Loy.)

Q. As a matter of fact heat causes evaporation, rather than freezing?

A. Both heat and freezing will cause evaporation.

Q. Heat causes a lot more evaporation than freezing?

A. Quicker evaporation, yes.

Q. And I understood you to say a while ago that it does not do fruit any good to let it thaw out and then freeze it again?

A. Oh, absolutely not; it breaks down the fruit that much more, every time it is frozen and thawed out.

Mr. SPENCER.—That is all.

JUROR.—You said that those 398 barrels still had some commercial value; what in your judgment would be that commercial value?

A. Well, that would depend a great deal on demand and supply at the time that the stuff was placed on the market. I would say this: That in the spring of 1920, when the futures were sold on loganberries in barrels, the market was in strong demand and good prices [390] were both paid the grower and the packer, and that during the fall the market dropped out on everything, so that it had virtually no market value in the latter part of the year in 1920.

JUROR.—But if these goods were re-processed as you say, why, they would be worth something?

A. They would command a commercial value, yes.

(Testimony of Hannis Loy.)

JUROR.—You would not be able to tell what that would be, or anything near it?

A. No, it is pretty hard to state, because it would be subject to the buyers, what he wanted to use it for; if he was wanting to make a high grade line of goods he could not use that stuff, and if he was going to make a cheap grade he would use a cheaper grade of stuff, and this stuff would qualify for a cheap jam. What I mean by cheap jam is not a damaged jam, but a jam that some manufacturers make with an apple base, use apple juice to set as the jelly is called, in this cheap jam.

COURT.—That is all.

Mr. BOOTHE.—Then you would say, Mr. Loy, that this entire lot of goods, these 398 barrels, have some fairly good commercial value right at the present time, would you? A. Yes, I would.

Witness excused.

Testimony of John Hill, for Defendants.

JOHN HILL, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

What is your name, did you say? A. Hill.

Q. Were you in the employ of the National Cold Storage and Ice Company during the summer of 1920? A. Yes, sir. [391]

Q. What were you doing?

A. Working in the warehouse.

(Testimony of John Hill.)

Q. Did you receive any of the goods that were shipped in by truck for H. A. Baker that came to that warehouse? A. Yes, sir.

Q. Do you remember when you received them, in the day time or night-time?

A. In the daytime.

Q. Do you remember how many different truckloads you received—about how many? I don't want to tax your memory on that, but you received several, did you? A. Received several, yes.

Q. I want to ask you more particularly what was the condition of those goods when they came in there, so far as outward appearances were concerned?

A. From outward appearances some of the barrels were in bad shape; some of them were blown up and some of them showed signs of fermentation; they were sizzling and leaking.

Q. How many on the truckload did you find in that condition?

A. Well, I would judge there would be probably twenty-five or thirty per cent of them.

Q. Could you hear them sizzling?

A. Yes, sir.

Q. What did you do with those goods when you received them?

A. I put them away in the basement in cold storage as fast as we could handle them.

Q. Were they put in there immediately after they came in? A. Yes, sir.

Q. Were they allowed to lie on the platform or

(Testimony of John Hill.)

in the aisle any unnecessary length of time?

A. No, sir.

Q. Would you take right hold of them and put them down immediately after they came in?

A. Yes, sir.

Q. Did you see any of the barrels blow up?

Q. Yes, I saw some of them blow up.

Q. Just explain to the jury what they did when they blew up?

A. Well, the heads would blow out of them and usually go plumb to the ceiling.

Q. What is that?

A. I say, the heads would blow out of the barrels and the contents [392] would go plumb to the ceiling, some of them.

COURT.—This is before they were put in the cold storage or after?

A. Some of them before and some immediately after; we had some of them blow up in the basement.

Q. That is before they were cold?

A. Yes, sir.

Mr. BOOTHE.—I think that is all.

Cross-examination.

(Questions by Mr. SPENCER.)

You say twenty-five to thirty per cent of them were sizzling and blowing up on the truckload?

A. I think so.

Q. And you just took them in and shoved them down in the basement?

A. Just as fast as we could handle them.

(Testimony of John Hill.)

Q. As fast as you could get them in. There was a whole lot more that were sizzling and blowing up around there after the first day of August, 1920, than before that, weren't there?

A. I could not say as to that.

Q. You don't remember that. As far as you are concerned, why, they were sizzling and blowing up all the way from the beginning of deliveries there in July to the end of the time is that right?

A. Well, I think the first part delivered, if I remember right, was the worst.

Q. The first part was the worst, in July?

A. If I remember right, yes, sir.

Q. They were sizzling and blowing up in July worse than they were in August?

A. If I remember right, yes, sir.

Witness excused. [393]

**Testimony of Wilbur P. Reid, for Defendants
(Recalled).**

WILBUR P. REID, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

I will ask you as to the statements of the storage sent to Mr. Baker; have you knowledge of that fact? A. Yes, I have.

Q. How often were those statements sent to Mr. Baker?

(Testimony of O. L. Kennedy.)

A. Mr. Kennedy is just coming in the door.

Witness excused.

Testimony of O. L. Kennedy, for Defendants.

O. L. KENNEDY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Kennedy, were you keeping the books of the National Cold Storage and Ice Company during the —from 1920 on? A. Yes, sir.

Q. Up to the present time? A. Yes, sir.

Q. And during all the time the Baker goods were coming in? A. Yes, sir.

Q. Did you make up the account for the amount due for storage? A. Yes, sir.

Q. Did you send statements to Mr. Baker on those accounts?

A. I did; I sent bills, invoices, from day to day, and statements at the end of each month for the balance due.

Q. Where did you send those statements?

A. All to Salem.

Q. Did you send all of them to Salem?

A. All to Salem.

Q. Who were they addressed to?

A. H. A. Baker.

Q. Did you send any to him at Tacoma?

A. Not as I remember of, no.

(Testimony of O. L. Kennedy.)

Q. Has he an office in Salem? A. Yes. [394]

Q. Who had charge of his office in Salem?

A. Mr. Van Doren, I believe.

Q. What room building—what building did you send them to? A. Just General Delivery, Salem.

Q. Did any of those—did you get an answer to any of those statements? A. No, none whatever.

Q. How did you address them, to H. A. Baker or to Van Doren?

A. H. A. Baker, Salem, Oregon.

Q. Did the envelopes have a return card on them?

A. Yes, return to National Cold Storage and Ice Company.

Q. Were any of those statements returned to you? A. None of them.

Q. How did you happen to send them to Salem? Were you directed by anyone, or how did you happen to send them to Salem?

A. When we first commenced receiving the goods Mr. Van Doren directed us to send all bills to Salem.

Q. General Delivery? A. Yes, sir.

Q. And addressed to H. A. Baker?

A. H. A. Baker, Salem.

Q. Now, you sent them every month, did you, a statement?

A. Sent them a statement at the end of each month, showing the balance due.

Q. Up to what time?

A. Up to—about, I think, either September thirtieth or October thirtieth.

(Testimony of O. L. Kennedy.)

COURT.—Of what year? A. Of 1921.

Q. What was the amount of the last statement that you sent to Mr. Baker, due for storage.

A. \$5811.34; that was statement of September thirtieth, 1921.

Q. Has any of this—well, I believe you said it had not been paid. That is all.

Cross-examination.

(Questions by Mr. SPENCER.) [395]

Mr. Kennedy, Mr. Baker, you know that Mr. Baker did not operate his packing plant in Salem during the winter months? A. Yes, sir.

Q. And he was not there, does not live in Salem?

A. Yes, I was aware that he was away part of the time.

A. And this bill that you sent out—these bills, included the storage charges on all of the stuff down to the end of the Fall of 1920; that was included in the bill, wasn't it?

A. Yes, all of the goods stored during the season of 1920.

Q. That of course included the 398 barrels in controversy? A. Yes.

Q. And in addition to that you still undertake to charge up against Mr. Baker storage for each month from the end of the season of 1920 clear down to September, 1921? A. Yes, sir.

Q. Well, you knew all the time that there was a controversy between Mr. Baker and Mr. Reid about the damages on these berries, didn't you?

(Testimony of O. L. Kennedy.)

A. Yes, sir.

Mr. SPENCER.—That is all.

JUROR.—About the first month's storage, was that \$1.15 a month per barrel?

A. \$1.15 per month per barrel, yes.

JUROR.—Do you know—someone testified here that included a freezing charge; it appears there was no freezing; was that an agreement, there should be such or is there a controversy over the fifty cents a month freezing charge?

A. We had an understanding with Mr. Baker as to the price of \$1.15 a month the first month and sixty-five cents a barrel each month thereafter.

JUROR.—And \$1.15, was that just for the storage, for handling the first month?

A. That covered all charges of handling in storage and freezing.

Q. (By Mr. SPENCER.) That covered a special item of freezing, didn't it?

A. Freezing and storage and handling the first month. [396]

Q. In 1920 you didn't have a freezer-room such as you—like you have got now? A. Yes.

Q. You had? You have got a room upstairs now that you have as a freezer that you put in your stuff and freeze it to a degree of some sixteen degrees? A. Yes.

Q. You didn't have that in 1920, did you?

A. Yes, we built that in 1920.

Q. You were not using it in the season of 1920?

(Testimony of O. L. Kennedy.)

A. Well, we were using it part of the time for berries.

Q. You didn't put these berries into that room then?

A. Yes, I think they went in. I am not sure of that; I didn't handle it.

Q. You don't undertake to say that these berries went into that freezing room in 1920, do you?

A. I am not saying that.

Q. But you had the freezing-room in 1920, did you? A. Yes, we built it in that year.

Witness excused.

Testimony of Hannis Loy, for Defendants (Recalled).

HANNIS LOY, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOOTHE.)

Mr. Loy, you have spoken about the re-processing of loganberries and as to the commercial value of berries in the condition these berries are in. I will ask you if you have re-processed berries in a similar condition and they were sold on the market?

A. In 1921 Mr. Fred—

Mr. SPENCER.—Now, if the witness has done so, I think, your Honor, he might be able to say so, but going into some other matter we don't know anything about—

(Testimony of Hannis Loy.)

COURT.—Say whether you have done so or not.

A. I have. [397]

Q. When? A. 1921.

Q. Were the goods in the same condition or similar condition to those of Mr. Baker's?

A. I would say they were in a worse condition than these berries when I examined them last year?

Q. And did you re-process those berries?

A. I did.

Q. What became of them after they were re-processed?

A. They were re-frozen and shipped and sold.

Q. Were they sold for as much as the market price of fresh berries? A. Not quite.

Q. What was the market price at that time of berries, generally?

A. These berries originally were sold at seven cents.

Q. What did these sell at that you re-processed?

A. At five cents.

JUROR.—What was the cost of re-processing?

A. About a cent a pound.

Cross-examination.

Q. How many of these berries did you handle that way? A. One carload.

Q. Sell them here? A. No, in Los Angeles.

Q. That was in 1921?

A. They were 1921 berries.

Q. Where did they come from? A. Salem.

Q. Who packed them?

(Testimony of Hannis Loy.)

A. Producers' Canning & Packing Company.

Q. Who?

A. Producers' Canning and Packing Company.

COURT.—Is that Mr. Kurtz' place? A. Yes.

Q. Got five cents for them? A. Yes.

Q. Do you know what the shrinkage was on them?

A. I could not say.

Q. You don't know?

A. There was a loss, of course, of the fruit that blew out of the barrels when the barrels blew.

Q. There was a loss of the barrels with that transaction?

A. No, we put in new heads. [398]

Q. Well, there was the work of re-coopering and putting in the heads?

A. Yes; I just told the jury approximately a cent.

Q. Cost of the sugar? A. Yes.

Q. What did sugar cost then?

A. Sugar cost then about—I think about \$5.20. It was Central American sugar that we used.

Q. Did you get five cents here or five cents in Los Angeles?

A. Five cents here.

Q. How much sugar does it take for that re-processing?

A. It all depends on the condition of the fruit. Judge each barrel by itself.

COURT.—Did you get more than one shipment during 1921 from Mr. Kurtz?

(Testimony of Hannis Loy.)

A. I didn't get a shipment, I re-processed for Mr. Kurtz.

COURT.—Did the firm get more than one shipment that went from Mr. Kurtz, do you remember?

A. I could not say.

Q. (By Mr. SPENCER.) Wadhams & Kerr didn't handle that shipment? A. No, sir.

Q. You did it yourself? A. I did.

Q. Are you working with Wadhams & Kerr now?

A. No.

Mr. SPENCER.—That is all.

Witness excused.

Mr. BOOTHE.—I want to introduce those two jars.

(Jars containing samples taken from barrels in controversy received in testimony and marked Defendants' Exhibit "H" and Defendants' Exhibit "I," respectively.)

Testimony of E. L. Patton, for Defendants (Recalled).

E. L. PATTON, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination. [399]

(Questions by Mr. BOOTHE.)

Mr. Patton, there are two jars of fruit there in front of you, I think? A. Yes, sir.

Q. Did you get those out of the barrels?

A. Yes, sir.

Q. What barrels did you take them out of?

(Testimony of E. L. Patton.)

A. One was a barrel—there was two barrels we re-processed.

Q. The barrels that Mr. Loy re-processed?

A. Yes, sir.

Q. When did you take them out of the barrel?

A. It was Monday, I think.

Q. And you took one out of—one of those jars represents each barrel?

A. Each barrel, yes, sir.

Q. Can you tell which is which, now?

A. Yes, sir. This jar came out of a barrel that the head had blown out.

Q. How do you know?

A. I had the barrel numbered, also the jars numbered.

Q. Well, can you tell from looking at the berries which was which?

A. Yes, sir; this jar here—

Q. The jar that you hold in your left hand there you say you took out of the one that had its head blown off? A. Yes, sir.

Q. The one that you hold in your right hand is the one that had not blown out? A. Yes, sir.

Q. Now, can you tell one from the other by its looks—by their looks?

A. You can tell by the one with the head blown out, the berries are mashed up more; they are more in a jam state. This one here the berries hold together in better shape and are not mashed up so.

Q. Have you numbered them on the top there so you can tell which is the blown up? A. Yes, sir.

(Testimony of E. L. Patton.)

Q. And which was the one that wasn't blown up?

A. Yes, sir.

Q. What marks have you got on them?

A. The one, the damaged barrel, is marked number one and the barrel that is in good condition is marked number two. [400]

Mr. BOOTHE.—We offer these two jars in evidence as Jar No. 1 received in evidence as Defendants' Exhibit "H"; Jar No. 2 received in evidence as Defendants' Exhibit "I."

Cross-examination.

(Questions by Mr. SPENCER.)

Mr. Patton, you remember when Mr. Huntley and Mr. Baker went down into the basement over there and got samples for chemical analysis?

A. I remember them coming down and taking samples.

Q. Some complaint has been made because they said Mr. Reid was not notified; when you got these samples for the jars did you notify Mr. Baker what you were doing?

A. I didn't know anything about it.

Q. You didn't do it? A. No.

Q. Mr. Baker wasn't around when these samples were arranged for? A. I didn't see him.

Q. And so far as you know he wasn't told anything about it?

A. I don't know anything about that.

Witness excused.

Mr. BOOTHE.—That is all our evidence, your Honor.

Mr. SPENCER.—No rebuttal.

Whereupon recess was taken until 1:30 P. M.

Portland, Oregon, June 15, 1922.

AFTERNOON SESSION.

Now, at this time, the Court and jury having heard the argument of counsel for the respective parties, the Court delivered to the jury the following instructions:

Instructions of Court to Jury.

COURT.—Now, gentlemen of the jury, as you are already [401] advised, this action is brought by Mr. Baker against the National Ice and Cold Storage Company to recover damages alleged to have been suffered by him on account of the negligence and carelessness of the defendant company in failing to maintain in their cold-storage plant a proper refrigeration temperature.

It appears that during the year 1920 Mr. Baker delivered to this company a considerable quantity of loganberries in barrels and that the company received these barrels for the purpose of keeping them in cold storage; that there now remains of the barrels delivered by Mr. Baker 398, containing 170,156 pounds of loganberries. That much is admitted. It is also admitted by the defendant that it received these berries for cold-storage purposes.

Mr. Baker alleges in his complaint that while the defendants received these berries for the purpose of putting them in cold storage and keeping them in such a room under such a temperature as would preserve them, that it failed and neglected to do

so, but allowed the temperature to rise and remain at that stage such a length of time that the berries spoiled and are now of no commercial value.

It is alleged in the complaint that during that season of 1920 and the fall of the year, that berries—the market price of loganberries was seventeen and a half cents a pound and he therefore asks judgment against the defendants for the full value of these berries at seventeen and a half cents a pound, or an amount of \$29,770.30.

The defendants deny by their answer that the loss of these berries was due to their negligence or carelessness on their part.

Now, as I have already said, the defendants were engaged in the cold-storage business and they received these goods— [402] admittedly received these goods for the purpose of keeping them in cold storage. If there was an understanding or agreement between them and Mr. Baker as to the temperature under which the room should be kept in which the goods were stored, then the defendants were under obligations to maintain that temperature, and if they did not do so and by reason of their negligence the goods were damaged or spoiled, Baker is entitled to recover from them the damages sustained by him.

If, on the other hand, there was no particular agreement as to the temperature which should be maintained in the storage-room, the defendants were bound to use such care in that respect as was ordinarily used by people engaged in that business and to maintain during the time these

goods were on storage the necessary temperature required and ordinarily used by people in the business, to preserve the berries, and if they failed and neglected to do so and by reason of that fact the goods were injured or spoiled, they are liable to Mr. Baker, the storer and the owner, therefor.

Now, there is a question in this case, and a question of fact, of course, as to the condition of the goods at the time they were received, and that is for you to determine, and that may have some bearing upon the question as to whether they were damaged or injured by reason of the negligence or carelessness of the defendant company or its failure to maintain a proper temperature in the storage room.

If the berries were in good condition at the time they were delivered to the defendant company and are not now in good condition, the burden would be on the defendants to show that their present condition is not due to their fault. If, on the other hand, they were not in good condition at the time of their [403] delivered and you believe from the evidence that the failure of the defendant company to maintain the proper temperature in the room, if they did so fail, did not cause the damage, then of course, you ought not to allow the plaintiff therefor.

Now, this is a question of fact in the case. The evidence is before you. It is apparent, and it is admitted, that from the first of August until some time later—and I don't undertake to tell the exact dates, because you will remember that—but from the first of August until some time later the tem-

perature in this room was equal to or perhaps above freezing; and whether that is a temperature that a cold-storage company ought to maintain for the purpose of preserving goods left with them—perishable goods left with them for that purpose, is, of course, a question of fact for you to determine; and if it was not and damage results therefrom the defendants are liable for such damage.

Now, this is a question, as I have said, of fact for you. There is some conflict in the testimony about the character of these goods and the condition of them when they were delivered. That is for you to determine; reconcile the testimony in conflict, if you can. If not, come to such a conclusion as to you seems most reasonable and probable under all the circumstances of the case, applying to the testimony your own experience and common observation.

If you find in favor of the plaintiff and that he is entitled to recover, then it will be necessary for you to find the amount of such recovery; and the measure of damages is the difference—will be the difference between the market price of these goods during the fall of 1920, at the time they would have moved if they had not been damaged, if they were damaged—if they had been in good condition they would [404] have moved during that time, according to the testimony—and the market value—the difference between the market value of the recovery. If the goods were entirely worthless for human consumption and as a commercial commodity, then the plaintiff would be entitled, if the de-

fendants are liable at all, to their full value; if they were not, if they had some commercial value, that should be deducted from the amount of the damage.

Then, in addition to that it is admitted that there is a storage charge. Mr. Baker agreed to pay storage on these goods, \$1.15 a barrel for the first month and sixty-five cents a barrel for the remaining months. That should be deducted from any amount that you may find in favor of Mr. Baker, if you should find in his favor, up to the time that the goods would have moved in the ordinary course of business.

Now, I don't know of any other question of law involved in this case. It is a pure question of fact for you to determine from the testimony.

JUROR.—May I ask a question.

COURT.—Yes, sir.

JUROR.—I would like to ask in regard to this stipulation on the back of these warehouse receipts.

COURT.—That has nothing to do with the issues in this case. There is a stipulation on the back of the warehouse receipts that, as I understand it, exempts the company from liability for certain damages from certain causes, but not for their own failure to maintain proper temperature in the storage room.

JUROR.—Will you state in regard to the taxes, the taxes they paid?

COURT.—That is not in issue in this case at all.

JUROR.—It is not? [405]

SECOND JUROR.—There would have been no taxes if they had moved.

COURT.—That is not in issue here. There are two forms of verdict have been submitted, one by the plaintiff, leaving the amount to be filled, that you may use, if you find in his favor, for any amount at all; the amount to be filled in by you. The other is a verdict by the defendant, leaving a similar blank. If you think the damages do not—if you think Baker is damaged at all and the damages do not exceed the storage charges, then of course, your verdict would be for the defendant.

If, on the other hand, you think the damages do exceed the storage charges, then your verdict would be in favor of the plaintiff for the difference.

JUROR.—Just make out a verdict on one of these?

COURT.—Yes, that is all; just one.

Whereupon the jury retired to consider of its verdict. [406]

Plaintiff's Exhibit No. 3.

Chicago Office:
130 North Wells Street,
With C. L. Jones & Co.

Boston Office:
131 State Street,
With C. L. Jones & Co.

H. A. BAKER,
Canneries at Puyallup and Lynden, Washington,
and Salem, Oregon.

Tacoma, Washington.
322 Tacoma Bldg.
July 15, 1920.

The National Ice & Cold Storage Company,
Portland, Oregon.

Gentlemen:

We are storing barreled goods with you, and wish you would wire this office at any time any of the barrels show distress. Should any of them commence to bulge at the head, take a 6 or 8 penny nail, drive it through the head three or four times, withdrawing it and allowing the gas to escape—and at all times notify me and Van Doren.

Yours very truly,

H. A. BAKER,
HAB.

HAB:C.

Filed June 15, 1922. G. H. Marsh, Clerk.

Plaintiff's Exhibit No. 4.

WESTERN UNION TELEGRAM.

Received at

76 Third Street, Cor. Oak, Portland, Oregon.

August 16, 1920. 9:15 P.M.

Bellingham, Wash.

National Cold Storage and Ice Co.

Portland, Oregon.

VanDoun wires me that temperature of room is up to thirty-six you know you will be liable for any loss at this temperature each barrel is worth about seventy dollars I beg you to get the temperature down to twenty-six or lower will ship out very fast now but barrels should be cooled to twenty-six before loading.

H A BAKER.

Filed June 15, 1922. G. H. Marsh, Clerk.

Plaintiff's Exhibit No. 5.

TELEGRAM.

POSTAL TELEGRAPH CO. 2-02 PM.

Portland, Ore., August 21, 1920.

H. A. Baker, 322 Tacoma Building,

Tacoma, Wash.

Temperature basement now 27 bubbling stopped floor clean have taken refrigeration off ice tank to do this expect 25 degrees to-morrow.

NATIONAL COLD STORAGE & ICE CO.

Filed June 15, 1922. G. H. Marsh, Clerk.

Plaintiff's Exhibit No. 6.

STATEMENT.

NATIONAL COLD STORAGE & ICE CO.

309 East Washington Street,

Portland, Oregon, Oct. 31, 1920.

H. A. Baker,

Salem, Oregon.

Sept. 30	To balance	.....	2687.54
Oct. 1	“ Storage	.....	142.45
	3	.....	1.95
	4	.....	28.60
	5	.....	3.90
	8	.....	.65
	9	.....	20.15
	10	.....	7.80
	12	.....	2.60
	13	.....	5.85
	14	.....	.65
	15	.....	1.30
	16	.....	13.00
	18	.....	8.45
	20	.....	.65
	21	.....	1.30
	23	.....	4.55
	27	.....	11.05
	28	.....	12.35

 \$2954.79

Defendants' Exhibit "A."

Chicago Office:
130 North Wells Street,
With C. L. Jones & Co.

Boston Office:
131 State Street,
With C. L. Jones & Co.

H. A. BAKER.

Canneries at Puyallup and Lynden, Washington,
and Salem, Oregon.

Tacoma, Washington,
322 Tacoma Building.

September 7, 1920.

National Ice & Cold Storage Company,
Portland, Oregon.

Gentlemen:

I wish you would kindly write me to the effect that you will assume the loss, due to fermentation on loganberries received by you this year from me in good condition. This is simply to confirm my conversation with Mr. Read, which I had when last in Portland—covering loss sustained by reason of the temperature in room being allowed to go up to 36. Mr. Read stated at the time that there would be no equivocation. That he would speak to his father and forward me this assurance. It is my intention to make this loss just as light as possible, and an agreement on both sides will help the matter very materially.

I wish you would load out one car containing all the strawberries which I think amount to 42 or 43 barrels, and sufficient loganberries to make up 100 barrels. This car to be shipped open billing to H. A. Baker, care Western Cold Storage Company, 16th and State Streets, Chicago. Be very careful about having the car thoroughly braced and iced and salted. Also be very careful that every barrel that is placed in this car is in perfect condition. All barrels that have been vented should be plugged again and the heads cleaned up, also the sides of the barrels, so that they will not have the appearance of having been in distress.

Wire Van Doren when ready.

You will kindly notify Van Doren, so that he may be with you when this car is loaded—and I am writing him to that effect.

Yours very truly,

H. A. BAKER,
HAB.

HAB:C.

P. S.—On second thought, I want you to cut down the temperature in that room to 24 for two days before this car goes out.—H. A. B.

Filed June 15, 1922. G. H. Marsh, Clerk. [410]

Defendants' Exhibit "B."

Wm. Reid, President.

Wilbur P. Reid, Treas. and Manager.

NATIONAL COLD STORAGE & ICE CO.

Office 309 East Washington Street,

Portland, Oregon, September 10, 1920.

Cold Storage Warehouse.

Manufacturers

and Wholesale Ice Dealers.

H. A. Baker,

322 Tacoma Building,

Tacoma, Washington.

Dear Sir:

In reply to your letter of the 7th instant, regarding loss on loganberries, we wish to state that we cannot agree to assume all the loss due to fermentation as proposed by you, for the reason that many of the barrels were in bad condition when received by us; in many instances a number of barrels blew before we could get them unloaded from trucks and transferred to the basement.

Many of the barrels were filled too full and the hot temperature of the outside atmosphere caused gas to form thereby resulting in distressed barrels. The fermentation started before going into cold storage. Therefore it would be impossible for us to ascertain just what amount of loss was due to our letting temperature get above freezing point for a few days.

We will admit that at the time you inspected the goods the temperature was higher than it should

have been and that the barrels showed fermentation but we at once reduced the temperature to 26 degrees and we have held it at this or colder which has stopped fermentation and they now seem to be in good condition. The temperature is now 24 degrees and the barrels are now ready for shipment, and as per your order for Chicago, a car has been ordered and we are assured the spotting of this car for loading on Saturday the 11th. As soon as we know definitely, we will wire Mr. Van Dorn. [411]

We are willing and want to be fair towards adjusting any loss that we are responsible for but cannot accede to your demand to assume all the loss due to fermentation. The depreciation to contents of barrels will not amount to much as they were frozen most of the time except for a day or two.

Now in regard to your request of the 8th inst., relative to lost negotiable warehouse receipt #180, covering 100 barrels loganberries issued to T. J. Station, Chicago; before issuing a duplicate copy of this, we wish to have a lost certificate from Mr. Station. It may be possible that he has endorsed this to some other party who will claim the delivery of said goods. We are writing Mr. Station today.

Very truly yours,

NATIONAL COLD STORAGE & ICE CO.

WILBUR P. REID, Manager.

R/S.

Filed June 15, 1922. G. H. Marsh, Clerk. [412]

Defendants' Exhibit "C."

Wm. Reid, President,

Wilbur P. Reid, Treas. and Manager.

NATIONAL COLD STORAGE & ICE CO.

Office 309 East Washington Street,

Portland, Oregon, Sept. 16, 1920.

H. A. Baker, 322 Tacoma Building,

Tacoma, Washington.

Dear Sir:

Yours of the 11th inst. to hand and in answer thereto, we wish to say that we cannot assume the loss as mentioned in your letters of September 7th and 11th.

We have fully explained our position in our letter of the 10th, to the effect that we are willing and want to be fair toward adjusting any loss that we are responsible for. You say that this can only be done by our assuring you that we will assume the loss. This would harmonize matters entirely in your favor but not for us.

The proper time for adjustment will be after said goods are disposed of, when the actual loss can be determined and at that time we will take up the matter of adjusting any loss which you claim to have sustained on account of our not properly handling the goods while in storage.

Loganberries are a very difficult commodity to handle and when the barrels were received at our plant, a great many were blowing and bursting, others were fermenting and heads of barrels bulging, so nail holes were made to relieve the gas pressure but notations were not made on the re-

ceipts at the time and we do not wish you to assume that all barrels were received in good condition. [413]

Car containing 40 barrels strawberries and 60 barrels loganberries left on the 14th September for Minnesota Transfer. Mr. VanDorn was here and checked same finding all the barrels in good condition. Have been unable to get car for Chicago but expect car by to-morrow. We will wire Mr. VanDorn as requested.

Yours truly,
NATIONAL COLD STORAGE & ICE CO.
WILBUR P. REID, Manager.

R/S.

Filed June 15, 1922. G. H. Marsh, Clerk.

Defendants' Exhibit "D."

August 9, 1920.

H. A. Baker,
Salem, Oregon.

Dear Sir:

We have on hand now about 50 bbls. that have blowed and as we have orders to ship these out we suggest that you send your men here to re-cooper and put them in shape for shipping.

Out of the last 31 received here, 11 have blowed and 1 that came in last night was a total loss.

Yours truly,
NATIONAL COLD STORAGE & ICE CO.,
Manager.

K/S.

Filed June 15, 1922. G. H. Marsh, Clerk. [414]

Defendants' Exhibit "E."

Chicago Office:
130 North Wells Street,
With C. L. Jones & Co.

Boston Office:
131 State Street,
With C. L. Jones & Co.

H. A. BAKER,
Canneries at Puyallup and Lynden, Washington,
and Salem, Oregon.

Tacoma, Washington,
322 Tacoma Building.

August 25, 1920.

National Cold Storage & Ice Company,
Portland, Oregon.

Gentlemen:

Acknowledging your favor of August 24th, beg to advise that the temperature of 27, will, I think be satisfactory, but very careful to keep the temperature at least as low as that. As soon as I have an opportunity, I will remove some of the stock.

In the meantime, it will be necessary to re-weigh all of these barrels as undoubtedly from 5 to 10# has oozed out of each, owing to fermentation, caused by the high temperature which you allowed to occur.

The cancelling of the warehouse receipt is perfectly correct.

Yours very truly,

H. A. BAKER,

HAB.

HAB:C.

Filed June 15, 1922. G. H. Marsh, Clerk. [415]

Defendants' Exhibit "F."

Chicago Office:

130 North Wells Street,
With C. L. Jones & Co.

Boston Office:

131 State Street,
With C. L. Jones & Co.

H. A. BAKER,

Canneries at Puyallup and Lynden, Washington,
and Salem, Oregon.

Tacoma, Washington,

322 Tacoma Bldg.

Sept. 11, 1920.

The National Ice & Cold Storage Company,

Portland, Oregon.

Gentlemen:

Answering your kind favor of September 10th, beg to advise that I did not expect you to assume any liability for loss from fermentation when barrels were received in bad condition by yourselves. Of course, this would be indicated by the receipts, as you should, and undoubtedly did, indicate on the receipts all berries that arrived in poor condition. That being the case, I wish you would write me a letter that you will assume any loss from fermentation on all loganberries other than those received in bad condition and so indicated on the receipt.

This I must insist upon before moving these loganberries—otherwise, I shall take the matter into court and I fear if the health authorities get a hold

of it, it will be serious. As it is, I hope to make the claim a comparatively light one. It is rather unfortunate that you shipped any loganberries at a time when the temperature was running from 33 to 36. That is what is now causing trouble in the East, as indicated by the car shipped to Durand & Kasper. However, I am handling the matter there to the best of my ability and for your interest—as I could, if I so desired, throw the whole responsibility upon you. I trust, and expect that you will work in harmony to make this loss as light as possible, and this can only be done by you assuring me that you will assume this loss. This must be in writing. Kindly attend to this at once.

You may ship one car of loganberries to Durand and [416] Kasper, care of the Western Cold Storage Company, Chicago,—open bill of lading, usual precautions for bracing and icing. Use very, very, very great care to see that this car is in perfect condition, and that the barrels are thoroughly washed, marked and re-plugged, so that there can be no suspicion of trouble. You understand that this is absolutely necessary for the reason that Durand and Kasper are now on the alert for trouble. I am writing J. L. Van Doren that you will wire him when you are ready to load this car out, that he may personally inspect it. This is absolutely necessary.

Yours very truly,

H. A. BAKER.

H.A.B.:C.

Filed June 15, 1922. G. H. Marsh, Clerk. [417]

Defendants' Exhibit "G."

Baker's "DFWKIST"

Washington Fruits.

H. A. BAKER,
INCORPORATED.H. A. Baker, President,
A. W. McCoy, Vice-President,
N. H. Kelley, Treasurer.

Factory at Sumner, Washington.

Tacoma, Washington.
322 Tacoma Building,
Oct. 5, 1920.National Ice & Cold Storage Company,
Portland, Oregon.

Gentlemen:

I wish you would raise the temperature of the room in which our fruits are stored to about 24 or 25. We expect some bursting of the heads in the barrels, which is certainly much more satisfactory than having them leak—as we know when the bursting is caused by expansion that they are frozen.

Again referring to the warehouse receipts requested by Wagstaffe—it seems that they do not want the warehouse receipt covering loganberries issued to Station. They want warehouse receipt covering 100 barrels loganberries which were sold them on August 14, 1919. If you will look up your records you will find that on August 9th, we shipped 85 barrels to them. On August 14th we transferred warehouse receipts on 100 barrels. On August 26th,

we shipped a car of 90 barrels, and on October 18th, warehouse receipt was issued to Station for 100 barrels. Please advise me at once whether or not by mistake you shipped the 100 barrels, warehouse receipt for which was issued August 14th, in place of the 100 barrels to Station, which I think was later transferred to Wagstaffe. Have you still 100 barrels in stock from last year, or have you 200 barrels? Kindly give me this information.

Yours very truly,

H. A. BAKER. INC.

HAB.

H.A.B.:C.

Filed June 15, 1922. G. H. Marsh, Clerk. [418]

Plaintiff's Exhibit No. 3.

(To Deposition of H. Theis.)

NATIONAL COLD STORAGE & ICE CO.

Office: 309 East Washington Street.

Cold Storage Warehouse Manufacturers and
Wholesale Ice Dealers.

Portland, Oregon, Nov. 17, 1920.

John Sexton & Company,
Illinois & Kingsbury Sts.,
Chicago, Ill.

Gentlemen:

Complying with the request in your letter of the 9th instant, we have shipt to you, 100 bbls of loganberries in PFE 14062, as per the B/L enclosed,

having followed your instructions in regard to icing and routing.

We are returning herewith our warehouse receipt #224, which shows the endorsement of 100 bbls. shipt.

We are also returning the schedule of barrels which should be attached to said receipt, which shows the numbers of the barrels shipt as checked in red.

Trusting this shipment will arrive in good condition,

We are,

Yours truly,

NATIONAL COLD STORAGE & ICE CO.

By O. L. KENNEDY. [419]

SHEET No. 1.

PLAINTIFF'S EXHIBIT No. 3.

(To Deposition of H. Theis.)

Schedule of barrels of berries transferred to John Sexton & Co.

Bbl. No.	Gross	Tare	Net	Bbl. No.	Gross	Tare	Net
			Fwd.	23889	2572	21317	
288	485	51	434	391	483	56	427
290	498	55	443	392	497	48	449
√ 296	475	52	423	388	484	59	435
√ 297	485	52	433	√ 394	480	51	429
√ 304	487	56	431	√ 396	487	54	433
√ 305	472	52	420	√ 397	483	51	432
312	486	55	431	√ 395	478	47	431
√ 314	477	52	425	√ 403	466	50	416
√ 316	483	52	431	404	474	55	419
√ 317	489	56	433	√ 401	454	50	404
√ 323	493	54	439	√ 410	466	56	410
324	474	45	429	√ 414	472	52	420
325	485	48	437	√ 415	489	52	437
326	475	50	425	√ 416	473	49	424
329	464	48	416	√ 413	481	54	427
√ 334	462	52	410	√ 417	450	52	398

√ 336	464	53	411	√ 405	453	49	404
√ 337	450	55	395	√ 406	463	54	409
338	487	52	435	√ 400	492	52	440
341	453	54	399	√ 418	479	55	424
√ 344	453	51	402	√ 419	490	54	436
345	499	52	447	√ 421	440	56	384
√ 347	434	51	383	√ 423	430	51	379
349	496	52	444	424	463	54	409
350	481	53	428	√ 420	472	54	418
√ 351	479	54	425	√ 425	481	54	427
√ 346	470	55	415	428	477	54	423
353	483	52	431	√ 430	473	56	417
√ 355	479	52	427	√ 432	475	55	420
√ 357	475	49	426	√ 433	474	54	420
√ 359	475	49	426	√ 434	464	52	412
361	483	49	434	√ 435	485	55	430
√ 362	480	50	430	√ 436	485	47	438
√ 363	471	52	419	438	475	54	421
√ 364	469	54	415	√ 439	458	55	403
√ 367	466	47	419	√ 440	478	54	424
√ 366	469	57	412	√ 441	465	54	411
√ 365	479	49	430	√ 442	469	52	417
√ 358	485	50	435	√ 443	461	52	409
√ 372	477	47	430	444	490	56	434
375	482	50	432	√ 445	476	55	421
√ 376	479	52	427	√ 446	487	59	428
377	489	49	440	448	473	50	423
√ 378	478	48	430	√ 449	490	53	437
379	488	53	435	√ 451	461	54	407
√ 380	484	48	436	√ 452	468	54	414
√ 381	483	49	434	√ 455	469	56	413
√ 383	478	52	426	474	485	53	432
385	490	53	437	√ 477	486	52	434
386	491	49	442	√ 479	486	52	434

23889 2572 21317

47579 5229 42350

[420]

SHEET No. 2.

PLAINTIFF'S EXHIBIT No. 3.

(To Deposition of H. Theis.)

Schedule of barrels of berries transferred to John Sexton & Co.

Bbl. No.	Gross	Tare	Net	Bbl. No.	Gross	Tare	Net
√ 463	466	54	412	√ 753	482	55	427
480	480	53	427	764	491	52	438+1
√ 484	484	52	432	766	482	50	432
√ 485	478	51	427	801	477	54	423
486	462	55	407	802	480	54	426
√ 488	474	52	422	√ 806	448	56	382+10
489	472	52	420	805	478	53	425
490	486	53	433	857	464	50	414
√ 494	484	56	428	859	456	54	402
495	480	57	423	872	490	51	439
√ 497	460	50	410	859	456	54	402
498	475	53	422	860	459	49	410
496	484	55	429	861	468	54	414
502	482	50	430	862	449	49	400
√ 503	466	52	414	863	434	50	384
√ 504	472	54	418	865	468	52	416
√ 509	486	50	436	858	434	49	385
√ 510	485	49	436	888	489	48	441
511	482	52	430	891	487	52	435
514	480	52	428	892	489	50	439
599	474	53	421	894	492	54	438
√ 600	484	55	429	895	501	53	448
√ 604	484	50	434	804	478	51	427
√ 606	470	50	420	√ 594	466	51	415
√ 653	458	48	410	√ 642	481	49	432
√ 666	486	52	434	911	448	48	400
665	496	57	439	921	476	47	429
√ 647	462	47	415	922	495	54	431+10
√ 675	471	52	419	924	497	54	443
√ 643	486	54	432	926	490	54	434+2
√ 659	490	50	440	928	486	50	436
676	482	51	431	931	481	49	432
√ 645	472	51	421	945	470	49	421
674	478	52	426	948	470	54	416
677	466	51	415	946	480	51	429
√ 683	476	54	422	953	484	54	430

√ 698	467	51	416	954	493	56	437
√ 703	493	54	439	955	486	52	434
704	480	54	426	940	474	54	420
√ 706	448	53	395	952	487	53	434
758	479	49	430	978	488	48	440
760	481	50	431	980	470	52	418
762	495	51	424	981	482	53	429
761	490	53	437	982	470	52	418
776	487	54	433	983	466	53	413
786	447	52	395	984	476	54	422
799	469	54	415	987	482	52	430
770	497	49	448	989	464	52	412
782	489	55	438	√ 993	470	59	411
765	489	52	437	996	461	54	407
<hr/>				<hr/>			
23884	2606	21278		47629	5208	42421	

Summary

Sheet #1	47579	5229	42350
“ 2	47629	5208	42421
<hr/>			
	95208	10437	84771

Numbers checked √ red shipt in PFE 14062

[421]

Plaintiff's Exhibit No. 4.

(To Deposition of Peter J. Slaughter.)

Chicago Office:

130 North Wells Street,

C. L. Jones & Co.

Factories at

Puyallup, Washington,

Lynden, Washington.

Salem, Oregon.

FRUIT CONTRACT.**H. A. BAKER.**

Date January 8, 1920,

Sold to Durand & Kasper Company, of Chicago, Ill.

Through C. L. Jones & Company, of Chicago, Ill.

Quantity	Package	Variety of goods	Price per lb.	Price per gal.	Price per doz.
1	car	2x1 Loganberries at packer's opening price. f. o. b. cold storage Pacific Coast 1920 pack two pounds fruit to one of sugar no preservatives—no ice			

DURAND & KASPER CO.Accepted by **PETER J. KASPER,**

Buyer,

Accepted **C. L. JONES & CO.,**

Brokers.

H. A. BAKER,

Seller.

By **N. H. KELLEY.** [422]

AND AFTERWARDS, to wit, on the 12th day of December, 1922, there was duly filed in said court a stipulation to send certain original exhibits to Court of Appeals as part of bill of exceptions, in words and figures as follows, to wit: [423]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID,
Partners Doing Business Under the Firm
Name and Style of NATIONAL COLD
STORAGE & ICE COMPANY,

Defendants.

**Stipulation to Send Certain Original Exhibits to
Circuit Court of Appeals as Part of Bill of
Exceptions.**

IT IS HEREBY STIPULATED and AGREED between the parties hereto that the Clerk of this Court in preparing a transcript of the complete record in the above-entitled cause may omit therefrom the various shipping receipts or bills of lading for goods shipped to Chicago offered in evidence as exhibits, but that the originals of said exhibits may be attached to the transcript and thereby become a part thereof.

IT IS ALSO STIPULATED that the two jars of fruit which were offered in evidence as exhibits on the part of the defendants have by mutual consent been destroyed and they are not to be considered on this appeal.

OMAR C. SPENCER,
Of Attorneys for the Plaintiff.
J. F. BOOTHE,
Attorney for the Defendants.

Filed December 12, 1922. G. H. Marsh, Clerk.

[424]

AND AFTERWARDS, to wit, on Tuesday, the 26th day of December, 1922, the same being the 43d judicial day of the regular November term of said Court.—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [425]

In the District Court of the United States for the District of Oregon.

No. L—8858.

December 26, 1922.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID,
Partners Doing Business Under the Firm
Name and Style of NATIONAL COLD-
STORAGE & ICE COMPANY,

Defendants

**Minutes of Court—December 26, 1922—Order to
Send Certain Original Exhibits to Circuit
Court of Appeals as Part of Bill of
Exceptions.**

Now at this time, upon considering the stipulation of the parties to this action to the effect that the shipping receipts or bills of lading for goods shipped to Chicago offered in evidence as exhibits, may not be copied in the transcript, but that the originals may be attached to the transcript and become a part thereof,

IT IS THEREFORE ORDERED that the clerk of this Court, in preparing the transcript of said cause to be transmitted to the Circuit Court of Appeals for the Ninth District, may omit printing in the transcript said exhibits, but the originals of all of said exhibits may be attached to the transcript by the Clerk and be considered by the Court of Appeals as a part of said transcript.

IT IS FURTHER ORDERED that the two jars of fruit offered as exhibits by the defendants which, having been by mutual consent destroyed, are not to be considered in the Appellate Court.

ROBERT S. BEAN,
Judge.

Filed December 26, 1922. G. H. Marsh, Clerk.
[426]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from three to 426, inclusive, constitute the transcript of record upon writ of error to the said court in a case in which H. A. Baker is plaintiff and defendant in error and William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, are defendants and plaintiffs in error; that said transcript of record has been prepared by me in accordance with the praecipe for transcript filed by the said plaintiff in error and is a true and complete transcript of the record and proceedings had in said court in said cause which the said praecipe directed to be included therein as the same appear of record and on file at my office and in my custody.

That I return with the said transcript of record the original writ of error issued in said cause and the original citation filed therein.

I further certify that the cost of the foregoing transcript is \$125.60 and that the same has been paid by the said plaintiff in error.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be affixed,

at Portland, in said District, this 29th day of December, 1922.

G. H. MARSH,
Clerk United States District Court for the District
of Oregon. [427]

[Endorsed]: No. 3965. United States Circuit Court of Appeals for the Ninth Circuit. William Reid and Wilbur P. Reid, Partners Doing Business Under the Firm Name and Style of National Cold Storage and Ice Company, Plaintiffs in Error, vs. H. A. Baker, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed January 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk. [428]

In the District Court of the United States for the
District of Oregon.

No. L—8858.

December 14, 1922.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID,
Partners Doing Business Under the Firm
Name and Style of NATIONAL COLD
STORAGE & ICE COMPANY,
Defendants.

**Order Extending Time to and Including December
30, 1922, to File Record and Docket Cause.**

Now, at this time, for good cause shown, it is
ORDERED that the time for filing the transcript
of record in this cause and docketing the same in the
United States Circuit Court of Appeals be and the
same is hereby extended to and including December
30, 1922.

WM. B. GILBERT,
Judge.

[Endorsed]: No. 3965. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Subdivision 1 of Rule 16 Enlarging Time to
and Including December 30, 1922, to File Record
and Docket Cause. Filed Dec. 18, 1922. F. D.
Monckton, Clerk. Re-filed Jan. 2, 1923. F. D.
Monckton, Clerk.

In the District Court of the United States for the
District of Oregon.

December 29, 1922.

H. A. BAKER,

Plaintiff,

vs.

WILBUR REID et al., Partners as NATIONAL
COLD STORAGE & ICE COMPANY,
Defendants.

**Order Extending Time to and Including January
3, 1923, to File Record and Docket Cause.**

Now, at this day, for good cause shown, it is
ORDERED that the time for filing the transcript
of record in the above-entitled cause and docketing
the same in the United States Circuit Court of
Appeals be and the same is hereby extended to and
including January 3, 1923.

R. S. BEAN,

Judge.

[Endorsed:] No. 3965. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Subdivision 1 of Rule 16 Enlarging Time
to and Including January 3, 1923, to File Record
and Docket Cause. Filed Jan. 2, 1923. F. D.
Monckton, Clerk.

